

(16,847.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 277.

THE ERIE AND WESTERN TRANSPORTATION COMPANY
ET AL., PETITIONERS,

vs.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE
PROPELLER "NEW YORK."

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Caption.....	a	1
Transcript from the district court of the United States for the eastern district of Michigan.....	1	1
Caption.....	1	1
Libel of the Erie and Western Transportation Co.....	1	1
Attachment.....	6	5
Bond.....	7	6
Claim of Union Steamboat Co.....	9	8
Answer of Union Steamboat Co.....	10	8
Order granting claimant leave to file cross-libel.....	13	11
Cross-libel of Union Steamboat Co.....	13	12
Hearing and submission.....	16	14
Evidence for libellant.....	17	14
Testimony of Hugh O. Miller.....	17	14
George Priest.....	49	43
David Stevenson.....	60	60

	Original.	Print.
Testimony of Steward M. Powrie.....	70	61
John W. Jordan.....	94	81
Dominick Jeans.....	100	86
Loomis P. Smith.....	111	95
James Kelly.....	128	111
William Black.....	138	118
Robert Smith.....	144	124
Fred M. Errill.....	151	130
Frank Davidson.....	155	133
John A. Hogan.....	158	136
Fred May.....	179	154
Oscar Lawson.....	183	158
Dory Linderman.....	189	164
Harry P. Linderman.....	195	169
Michael Crowe.....	201	174
Loomis P. Smith (recalled).....	211	182
Hugh O. Miller (recalled).....	213	184
Harry J. Gregg.....	221	191
J. S. Linderman.....	221	191
Paul Verrault.....	221	191
Joseph W. Johnson.....	222	192
Interlocutory decree against propellers "New York" and "Conemaugh," damages to be equally divided.....	223	193
Motion for rehearing by libellant.....	223	193
Notice of motion for rehearing.....	225	194
Rehearing and submission.....	226	196
Interlocutory decree of October 31, 1892, vacated, and new decree entered adjudging the propeller "New York" solely at fault, etc.....	226	195
Opinion of Swan, J.....	227	196
Motion by propeller "New York" to vacate decree of May 16, 1895.....	229	198
Affidavit of H. C. Wisner.....	230	198
Charles E. Kremer.....	232	200
John C. Shaw.....	233	201
Harvey D. Goulder.....	235	203
Order denying claimant's motion to vacate decree of May 16, 1895.....	237	204
Motion by the Union Steamboat Co. to vacate interlocutory decree, etc.....	238	205
Order denying motion to vacate interlocutory decree, etc.....	239	206
Final decree.....	240	206
Petition for appeal by the Union Steamboat Co.....	243	208
Assignment of errors.....	244	209
Appeal bond.....	245	210
Stipulation as to evidence and facts.....	248	213
Stipulation as to omissions from transcript.....	249	213
Calendar entries.....	250	214
Citation.....	252	216
Clerk's certificate.....	253	217
Supplemental transcript from the district court of the United States for the eastern district of Michigan.....	255	217
Notice to take testimony for respondents.....	255	217

INDEX.

III

	Original.	Print.
Evidence for respondents.....	257	218
Testimony of John Vaughn.....	257	219
Exhibit Log Book.....	262	223
Testimony of John O'Rourke.....	274	234
Testimony of Joseph Howlett.....	284	242
Exhibit A—Protest of John C. Shaw.....	287	245
B—Objections of F. H. Canfield.....	288	246
Clerk's certificate.....	289	247
Appearance for appellant.....	291	247
Appearance for intervening petitioners.....	291	247
Note as to missing motion to admit certain depositions.....	292	248
Affidavit of John C. Shaw.....	292	248
Order overruling motion to admit certain depositions.....	295	250
Motion for order requiring testimony as to Canadian statute.....	296	250
Affidavit of John C. Shaw.....	297	251
Darius J. Davison.....	298	252
Harvey D. Goulder.....	299	252
Order setting cause for hearing.....	300	253
Motion for order requiring testimony as to Canadian statute.....	301	253
Affidavit of John C. Shaw.....	302	254
Harvey D. Goulder.....	304	255
Darius J. Davison.....	305	255
Motion for certiorari.....	306	256
Order granting certiorari.....	307	257
Writ of certiorari.....	308	257
Return to writ of certiorari.....	309	258
Order to transmit Canadian statutes.....	309	258
Exhibit A—Revised Statutes of Canada, 1886, vol. 1, chap. 79, An act respecting the navigation of Canadian waters, A. D. 1886.....	309	258
Clerk's certificate.....	324	267
Stipulation as to bills of lading, &c.....	325	267
Bill of lading.....	326	268
Hearing and submission.....	331	273
Order discharging first bond given by American Surety Co.....	332	274
Final decree.....	332	274
Opinion.....	334	275
Order granting time to file petition for rehearing.....	346	286
Petition for rehearing.....	346	287
Order dismissing petition for rehearing.....	349	288
Clerk's certificate.....	350	288
Writ of certiorari.....	351	289
Return to writ of certiorari.....	352	289



a United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO.,	}
Claimant,	
v.	
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL.	}

Be it remembered that on the 14th day of August, 1896, the propeller "New York"—the Union Steamboat Company, claimant—came into said court and filed a transcript of record from the district court of the United States for the eastern district of Michigan in the words and figures following:

1 *Transcript of Record.*

Pleas of the district court of the United States for the eastern district of Michigan, begun and held at the district court room, in the city of Detroit, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and ninety-one.

Be it remembered that on the eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-one, the Erie and Western Transportation Company, by H. D. Goulder, and Shaw & Wright, its proctors, came into the said court and filed a libel in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

The libel of the Erie and Western Transportation Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal office in the city of Philadelphia, Pa., against the propeller New York, her engines, boilers, machinery, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interests therein, in a cause of collision civil and maritime; and thereupon said libellants do allege and propound as follows:

First. That your libellant at the time of the collision hereinafter mentioned, was the sole owner of the propeller "Conemaugh," which said propeller, as well as the propeller "New York," were vessels of twenty tons burden and upwards, employed in the business of commerce and navigation upon the Great Lakes and the navigable waters connecting the same.

Second. That on the 21st day of October, A. D. 1891, the said propeller "Conemaugh," being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong and in every respect well manned, tackled, appareled and appointed, and having

the usual and necessary complement of officers and men stationed at their proper posts, upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Milwaukee, Wisconsin, to the port of Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting principally of flour, bran, oil cake and pig lead. That about eight o'clock on the evening of said day a collision occurred between the above-named propeller "Conemaugh" and "New York" in that part of the Detroit river a short distance below the town of Sandwich, on the Canadian side of the river. That before and at the time of said collision the said propeller "Conemaugh" was in every particular obeying the rules of navigation with due regard to the safety of the said propeller and the vessels that she might meet and pass; and that the said collision occurred without any fault, negligence or misconduct on the part of libellant or those in charge and on board of the said propeller "Conemaugh."

Third On the American side of the Detroit river a little below the River Rouge was, and is, a coal dock known as "Smith's coal dock." Between seven and eight o'clock p. m., of said day, the weather then being clear and fine, the "Conemaugh" was proceeding down the Detroit river to the American side of mid-channel, having hauled some to starboard to avoid some piles driven in the channel, and when a half or three-quarters of a mile above the said coal dock, she received a signal of two blasts from a steamer which, with four barges in tow, had, theretofore been going down the Canadian side of the river and was then rounding in and up to and was near the said coal dock, exhibiting her masthead and green lights to the "Conemaugh."

The "Conemaugh's" engine was at once checked and remained checked until after the time of collision hereinafter stated, her helm starboarded, and she answered with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was "rounding to" and which then stretched out in the river towards the Canadian side.

The "Conemaugh" then made the lights of a steamer, which proved to be the said propeller "New York," then down the river below the said tow and coming up so heading towards the "Conemaugh," and on such a course that the "Conemaugh," as she was proceeding, would cross the "New York's" course before the "New York" could reach the point of intersection of the two courses.

The "Conemaugh" at once blew to her a signal of two loud and distinct blasts of her whistle, thus notifying the "New York" that the "Conemaugh" was so directing her course as to go well in on the Canadian shore and to leave the tow and the "New York" to starboard as she should come abreast of them respectively.

Not receiving a reply thereto, the "Conemaugh" promptly repeated the signal of two blasts. To this second signal the "New York" did not reply, and again the "Conemaugh" blew a two-blast signal; when the "New York," which had all the time been coming

rapidly up the river, still without replying to any of the "Conemaugh's" signals, turned suddenly and rapidly to starboard, swinging over toward the Canadian shore; whereupon the "Conemaugh" blew alarm whistles and hard-starboarded her helm.

Notwithstanding there was ample room, had the "New York" properly approached, and had she been properly handled, for the "Conemaugh" and the "New York" to have safely passed each other and the tow in accordance with the signals of the "Conemaugh," the "New York," first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on full speed, and with her stem struck the "Conemaugh" with tremendous force on the starboard side, abreast the Texas, and almost immediately the "Conemaugh" struck the Canadian bank of the river, and filled and sank, the New York having cut deeply into her and crushed her side. That the signals of the "Conemaugh," above mentioned, were of the proper and usual character, given by loud and distinct blasts of a good and sufficient steam whistle, but the "New York" throughout disregarded every one of said signals and ran over into and collided, at full speed, with the "Conemaugh," without answering or heeding or herself giving any signals whatever.

That before and at the time of said collision, it was a quiet, calm and clear evening, lights could be seen a long distance away, and steam whistles could be heard at a great distance.

Fourth. The libellant is informed and believes that the said collision is entirely due to the fault of those in charge of the navigation of the said propeller "New York," and charges that the said propeller is at fault as follows:

1. In not keeping a proper and sufficient lookout.
2. In being in charge of incompetent, reckless and negligent officers.
3. In adopting and pursuing the course she did until close
4. to the point where she would meet the "Conemaugh" and then in departing violently to starboard from said course.
4. In changing her course a second time and turning and swinging over and into and against the "Conemaugh."
5. In not passing clear on the starboard side of the "Conemaugh," or checking, stopping and reversing her engines before her actions made the same necessary.
6. In that, being the ascending vessel, she maintained her course, and in not checking her speed or stopping if, for any reason, she found it necessary or advisable not to proceed on the course she had previously adopted.
7. In not answering the "Conemaugh's" signals and in not giving the "Conemaugh" any signal whatsoever.
8. In disregarding the signals she had received from the "Conemaugh."

Fifth. That by reason of the said collision, the said propeller "Conemaugh" and her cargo became and were greatly damaged.

That in raising the said propeller and her cargo the libellant has

been put to the great expense, as near as the same can now be estimated, of, to wit, the sum of ten thousand dollars (\$10,000.00).

Also, that by said collision, as nearly as can be ascertained, the hull of the "Conemaugh" sustained damage to the amount of twenty thousand dollars (\$20,000.00), and her cargo to the amount of thirty thousand dollars (\$30,000.00).

That at the time of said collision the said propeller "Conemaugh" was employed in carrying freight, which was a profitable employment to libellant and which, by reason of said collision, it is unable to continue for the remainder of the season of navigation of the year 1891, to libellant's loss, as near as can be ascertained, ten thousand dollars (\$10,000.00).

Sixth. That on account of said collision, the aggregate amount of damage, here sued for and sustained by the libellant as the owner of the said propeller "Conemaugh," and also as trustee for the owners of the said cargo, is, as near as the same can be ascertained, the full sum of seventy thousand dollars (\$70,000.00).

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, and that the said propeller "New York" is now or soon will be within the district aforesaid.

Wherefore, your libellant prays that process in due form of law, according to the course and practice of this honorable court
 5 in cases of admiralty and maritime jurisdiction, may issue against the said propeller "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture; and that all persons having an interest therein may be cited to appear and answer all and singular the matters aforesaid; that this honorable court will be pleased to decree the payment of the damages aforesaid with costs; that the said propeller "New York" may be condemned and sold to pay the same; and that your libellant may have such other and further relief as in law and justice this libellant is entitled to receive.

THE ERIE AND WESTERN TRANSPORTATION COMPANY,

By JOHN C. SHAW, *Proctor for Libellant.*

H. D. GOULDER AND
 SHAW & WRIGHT,

Proctors for Libellants.

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
 County of Wayne,

John C. Shaw, of the city of Detroit, one of the proctors for the libellant in the foregoing libel, being duly sworn, says: That said libellant, as deponent, is informed and believes, is a corporation duly organized and existing under the laws of the State of Pennsylvania, and is a resident of said State, and that none of the libellant's officers are now within the State of Michigan. That the matters set forth in the foregoing libel are derived from sworn statements obtained from various witnesses of the therein-mentioned

collision, and from other reliable sources by this deponent. That deponent has read the foregoing libel and knows the contents thereof, and that the matters therein stated are true, to the best of the knowledge, information and belief of this deponent.

JOHN C. SHAW.

Sworn to and subscribed before me, this 11th day of November, A. D. 1891.

HENRY A. HARMON,
Notary Public, Wayne County, Michigan.

Afterwards, on the 11th day of November, A. D. 1891, an attachment was duly issued pursuant to the prayer of said libel, for the arrest of said steamer "New York," which attachment was in the words and figures following, to wit:

6 District Court of the United States for the Eastern District of Michigan, ss:

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

Whereas, a libel hath been filed in the district court of the United States for the eastern district of Michigan, on the 11th day of November, in the year of our Lord one thousand eight hundred and ninety-one, by the Erie and Western Transportation Company, against the propeller "New York," her engines, boilers, boats, tackle, apparel and furniture, claiming damages suffered on occasion of a collision which occurred between said propeller and its propeller "Conemaugh," on or about October 21st, 1891, in the Detroit river, near Smith's coal dock, through the fault and negligence of those in charge of the navigation of said propeller "New York," the sum of seventy thousand dollars, \$70,000.00, for the reasons and causes in the said libel alleged and mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said propeller, her engines, tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said propeller, her engines, tackle, etc., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are therefore hereby commanded to attach to the said propeller "New York," her engines, boilers, boats, tackle, etc., and to detain the same in your custody until the further order of the said court respecting the same, and to give due notice to all persons claiming the same, or knowing, or having anything to say why the same should not be condemned and sold, pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for said eastern district of Michigan, on the first Tuesday of December next, at 10 o'clock of the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next

day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan, at the district court room, in the city of Detroit, in the said
7 district, this eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and sixteenth.

D. J. DAVISON, *Clerk.*

Afterwards, on the 21st day of November, A. D. 1891, a bond to answer judgment in said cause was filed in the words and figures following, to wit:

Know all men by these presents, that we, The Union Steamboat Company, as principal, and The American Surety Company of the City of New York, as surety, are held and firmly bound unto the Erie and Western Transportation Company in the sum of seventy thousand dollars, lawful money of the United States of America, to be paid to the said The Erie and Western Transportation Company, its successors or assigns, for which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

In witness whereof, we have caused these presents to be executed and our corporate seals hereto affixed, this 12th day of November, 1891.

Whereas, in a certain cause of collision, civil and maritime, moved and prosecuted, or to be moved and prosecuted, in the district court of the United States of America, for the eastern district of Michigan, on behalf of the above-named obligee against the ship or vessel, called the steamer "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture, a warrant of arrest has been or is about to be, or may, be issued out of said court against the said ship or vessel, her engines, boilers, machinery, tackle, apparel and furniture.

And whereas, said The Union Steamboat Company, the claimant and owner of said steamer, has appeared or is about to appear in said cause and to file an answer to the libel therein and defend the same.

Now, therefore, the condition of the above obligation is such that if the said The Union Steamboat Company, the claimant of the said ship or vessel, her engines, boilers, machinery, boats, tackle, apparel and furniture, shall well and truly appear, and abide and answer the decree of said court in the aforesaid cause, without fraud or

other delay, then the above obligation to be void, otherwise it shall remain in full force and virtue.

[SEAL.] THE UNION STEAMBOAT COMPANY,
By JOHN KING, *President*.

8 Attest: A. R. MACDONOUGH, *Secretary*.

[SEAL.] AMERICAN SURETY COMPANY OF
NEW YORK,
By DAVID B. SICKEL, *2nd Vice-President*.
CORTLANDT S. VAN RENSSLEAR,
Ass't Secretary.

GEO. L. HOLMES,
As to Am. S. Co.

DETROIT, Nov. 21, 1891.

We hereby consent to the approval of the foregoing bond.

SHAW & WRIGHT,
Proctors for the Libellant.

I do hereby approve the sufficiency of the within bond and of the surety therein, upon the foregoing stipulation of libellant's proctors.

HENRY H. SWAN,
U. S. District Judge.

Detroit, Nov. 21, 1891.

STATE OF NEW YORK,
Southern District of New York, City and County of New York, } ss :

I hereby certify, that on this 13th day of November, 1891, before me came the above-named Augustus R. Macdonough, of the Union Steamboat Company, to me personally known, who being by me duly sworn, did depose and say that he resides in the city of New York; that he was and is the secretary of the said The Union Steamboat Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing bond was and is the corporate seal of said company; that it was so affixed by him by order of the board of directors of said company, and that he signed his name thereto as secretary of said company, by like order and authority.

[SEAL.] GEO. E. GRANT,
Notary Public, N. Y. City and Co.

That afterwards, on the 30th day of November, A. D. 1891, a claim was filed in said court and cause in the words and figures following:

8 THE ERIE & WESTERN TRANSPORTATION CO. ET AL. VS.

9 In the District Court of the United States for the Eastern District of Michigan.

THE ERIE AND WESTERN TRANSPORTATION COMPANY

vs.

THE PROPELLER "NEW YORK," HER ENGINES, BOILERS, BOATS,
etc.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan :

Now comes, by Washington Bullard, its gen. manager, hereto duly and fully authorized, the Union Steamboat Company, a corporation and sole owner of the said propeller "New York," her engines, boilers, boats, etc., intervening for said company's interest in the said property, appears before this honorable court and claims the said property and states that the said The Union Steamboat Company is the true and *bona fide* owner thereof, and that no other person or persons is the owner thereof; and said Union Steamboat Company enters the appearance in this action of the said propeller New York, her engines, boilers, boats, etc., as defendant herein, and of The Union Steamboat Company, as claimant and respondent herein.

And thereupon, the said claimant prays that this honorable court will be pleased to decree a restitution of the aforesaid property to it and otherwise right and justice to administer in the premises.

THE UNION STEAMBOAT COMPANY,
By WASHINGTON BULLARD,

General Manager.

Subscribed and sworn to before me, this 28th day of November, A. D. 1891.

H. D. FITZGERALD,
U. S. Commissioner, Northern District of New York.

Afterwards, on December 14th, A. D. 1891, an answer was filed in said court and cause in the words and figures following, to wit.

In the District Court of the United States for the Eastern District of Michigan.

10 To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan :

The answer of the Union Steamboat Company to the libel of the Erie & Western Transportation Company against the propeller "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture, alleges as follows:

First. That the above-named claimant is now and was at the different times mentioned in said libel, a corporation duly organized and existing under the laws of the State of New York, with its principal office in Upper Nyack, Rockland county, in the State of New York.

Second. That the said claimant is now and was at the time of said collision mentioned in said libel the sole owner of the said propeller "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture.

Third. That the claimant admits the truth of the allegations of the first article of said libel, and that as to the matters and things contained in the second, third and fourth, fifth and sixth articles of said libel, claimant alleges, upon information and belief, that they are in great part untrue and falsely alleged; and claimant, therefore, denies the same except wherein they may be hereinafter specifically admitted to be true.

Fourth. And for a full and further answer to the said libel, claimant alleges that on the 21st day of October, 1891, the propeller New York, being then and also at the time of the collision mentioned in said libel, tight, staunch and strong, and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts upon the lookout for the safety of the said vessel, and having her side and bright lights properly stationed and burning brightly, was bound on a voyage from Buffalo, New York, to the port of Milwaukee, Wisconsin, laden with a cargo of general merchandise. That on the said day, between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh, in the Detroit river, below the town of Sandwich, on the Canadian side of the river; that before and at the time of said collision, the propeller New York was bound up said river, and when nearing the point in said river below where the River Rouge empties into the Detroit river, a steamer, with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as

Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern. While passing under the stern of this barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller which proved to be the Conemaugh were heard close at hand and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York which was then swinging under a hard star-

board helm. A collision was then inevitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this the Conemaugh with considerable headway, continued on her course across the bows of the New York so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank, and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge, she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a manoeuvre
12 was attempted a collision could best be avoided by swinging clear under a hard-a-starboard helm.

Fifth. That claimant is informed and believes that said collision was due entirely to the fault of those in charge of the navigation of the propeller "Conemaugh," and charges that said propeller is at fault as follows:

- 1st. In not keeping a proper and sufficient lookout.
- 2nd. In being in charge of incompetent, reckless and negligent officers.
- 3rd. In not carrying the lights required by law brightly burning and properly displayed.
- 4th. In adopting a course which would take her into Canadian waters, and on that side of the channel usually navigated by up-bound steamers.
- 5th. In attempting to pass the New York starboard side to starboard side instead of port side to port side.
- 6th. In changing her course in pursuance with such passing signals before receiving an assenting answer to such signals.
- 7th. In not keeping out of the way of the New York when the latter was on her starboard bow and side.
- 8th. In attempting to keep out of her way by giving a signal of two blasts and crossing her bows instead of passing her by giving a signal of one blast and by going under her stern.
- 9th. In not blowing proper passing signals.
- 10th. In not stopping and backing when her passing signal was not answered.
- 11th. In not earlier blowing an alarm whistle.
- 12th. In attempting to pass the New York in the immediate proximity of the last barge and in the narrow channel left by said barge at the time of said collision.

Sixth. That by reason of the said collision the propeller New York has sustained damages to her stem and other parts of her forward.

Seventh. That said collision occurred without any fault or negligence of those in charge of the said propeller New York.

Eighth. That all and singular the premises are true.

Wherefore claimant prays that the libel herein may be dismissed with costs, and for such other and further relief and redress as in law and justice claimant is entitled to receive.

THE UNION STEAMBOAT COMPANY,
By WASHINGTON BULLARD,

General Manager and Director.

SCHUYLER & KREMER,
WILLIAMS & POTTER, *Proctors.*

13 STATE OF NEW YORK, }
Northern District of New York, County of Erie, } ss :

Washington Bullock, *who* being by me duly sworn, did depose that he is an officer, to wit, a director of the Union Steamboat Company, the claimant in the foregoing answer named. Said affiant further makes oath upon information and belief that said answer was in all respects true.

[SEAL.]

JOHN H. BROGAN,
Notary Public in and for Erie Co., N. Y.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room in the city of Detroit, in said district, on Thursday, the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION	}	On Libel for Collision. In Admiralty.
Company		
vs.		
THE PROP. NEW YORK, HER ENGINES, ETC.	}	

This cause now came on for hearing pursuant to assignment, and thereupon, on application of the claimant, leave is granted to file a cross-libel herein, which is now presented and filed, and thereupon the court hear the pleadings and the testimony in part, and the cause is continued for further hearing.

Afterwards, on Feb'y 25th, 1892, a cross-libel was filed in said court and cause in the words and figures following:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan :

The cross-libel of the Union Steamboat Company against the propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, alleges as follows :

14 First. That at the different times hereinafter mentioned, said cross-libellant was the sole owner of the propeller New York, her engines, boilers, boats, tackle, apparel and furniture, and that no other person or persons were the owners thereof.

Second. That on or about the 21st day of October, 1891, said propeller New York, being then and also at the time of the collision, tight, staunch and strong, and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts upon the lookout for the safety of the said vessel, and having her side and bright lights properly stationed and burning brightly, was bound on a voyage from Buffalo, New York, to the port of Milwaukee, Wisconsin, laden with a cargo of general merchandise. That on the said day, between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh, in the Detroit river, below the town of Sandwich, on the Canadian side of the river; that before and at the time of said collision, the propeller New York was bound up said river, and when nearing a point in said river below where the River Rouge empties into the Detroit river, a steamer with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of her barges in tow, as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessels, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank and there not being room enough for any vessel to pass safely between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter, starboarded so as to go close under her stern. While passing under the stern of this barge and not more than ten or twenty feet from her, several short blasts of the whistle of the propeller—which proved to be the Conemaugh—were heard close at hand and not more than 100 feet away. The Conemaugh pursued her

15 course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision

was then inevitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received, the New York was close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could, with safety, pass her starboard side to starboard side, and if such a manœuvre was attempted a collision could be best avoided by swinging clear under a hard-a-starboard helm.

Third. That cross-libellant is informed and believes that said collision was due entirely to the fault of those in charge of the navigation of the propeller Conemaugh, and charges that said propeller is at fault as follows:

- 1st. In not keeping a proper and sufficient lookout.
- 2nd. In being in charge of incompetent, reckless and negligent officers.
- 3rd. In not carrying the lights required by law brightly burning and properly displayed.
- 4th. In adopting a course which would take her into Canadian waters and on that side of the channel usually navigated by up-bound steamers.
- 5th. In attempting to pass the New York starboard side to starboard side, instead of port side to port side.
- 6th. In changing her course in pursuance with such passing signals before receiving an assenting answer to such signals.
- 7th. In not keeping out of the way of the New York when the latter was on her starboard bow and side.
- 16 8th. In attempting to keep out of her way by giving a signal of two blasts and crossing her bows instead of passing her by giving a signal of one blast and going under her stern.
- 9th. In not blowing proper passing signals.
- 10th. In not stopping and backing when her passing signal was not answered.
- 11th. In not earlier blowing an alarm whistle.
- 12th. In attempting to pass the New York in the immediate proximity of the last barge in the narrow channel left by said barge at the time of said collision.

Fourth. That by reason of said collision said propeller New York was damaged on her stem and bow so that repairs became necessary, and that cross-libellants were damaged in the cost of repairs and detention of said vessel, amounting in all to the sum of three thousand dollars.

Fifth. That all and singular the premises are true.

Wherefore, cross-libellant prays that process in due form of law may issue, if necessary, against the propeller Conemaugh, and that libellant herein may be ordered to file the usual stipulation and make answer according to the practice of the court, and for such other and further relief and redress in the premises as cross-libellant is entitled to receive.

THE UNION STEAMBOAT COMPANY,
By W. BULLARD, *Gen. Manager.*

SCHUYLER & KREMER,
Proctors for Cross-libellant.
H. C. WISNER, *Advocate.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

W. Bullard, being sworn, deposes and says that he is an officer, to wit, a director of the Union Steamboat Company, the claimant in the foregoing answer named. Said affiant did further make oath upon information and belief that said answer was in all respects true.

ROBERT T. GRAY,
Notary Public, Wayne County, Mich.

And thereafter, on the 26th day of February, A. D. 1892, said cause came on to be further heard in open court, and the hearing continued from day to day until March 2nd, 1892, when the same was submitted to the court for judgment.

The following is the testimony taken on such hearing :

17 The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY }
vs. }
THE PROPELLER "NEW YORK," HER ENGINES, ETC. }

FEBRUARY 25, 1892.

HUGH O. MILLER, after being duly sworn on behalf of the libellant, testified as follows :

Examined by Mr. GOULDER :

Q. You were the master of the Conemaugh at the time of this collision with the New York ?

A. Yes, sir.

Q. How long have you sailed on lakes as master of steel vessels ?

A. This is my third season. Two and a half seasons, you might say.

Q. How long had you sailed as mate prior to that?

A. Four seasons.

Q. How long have you sailed in steamers altogether on the lakes?

A. Since 1879.

Q. In what condition was the Conemaugh on this night prior to the collision?

A. In good condition, sir.

Q. How were her engines, machinery, outfit, generally?

A. In good condition.

Q. What were the dimensions of the Conemaugh?

A. Somewhere in the neighborhood of 250 feet; 35 feet beam.

Q. Were you loaded?

A. Yes, sir.

Q. What was your draft of water, about?

A. About 15 ft. 3.

Q. So far as your signal lights are concerned, when do you recollect looking at them, noticing them, if at all, last before the collision?

A. Abreast of Belle island.

Q. And in what condition were they then as to their burning, your masthead, red and green lights?

A. Burning brightly.

Q. What kind of lights did she have?

18 A. The regulation lights.

Q. And of a large or small size?

A. Very large size.

Q. Did you notice any of those lights after the collision?

A. I did.

Q. What did you notice in that regard?

A. I noticed that the side lights were burning brightly; the headlight was out.

Q. Coming by Detroit, and from there down to the point of collision, who did you have on deck?

A. The second mate and the lookoutsman and the man at the wheel.

Q. Where were you all the time?

A. On the bridge.

Q. Where was the lookoutsman?

A. He was down forward on the promenade deck.

Q. How near the stem?

A. I don't believe he was over 12 or 15 feet, maybe less.

Q. Where were the second mate and the wheelsman?

A. The wheelsman was at the wheel and the second mate was giving him a hand.

Q. As you came down below Detroit, below Sandwich point, I will ask you whether you noticed anything of a tow going down the river.

A. At or about the time I approached the River Rouge, I did, something. I could not make out what it was.

Q. What was the first signal that you got after you had passed the River Rouge from anybody?

A. Two blasts of a steam whistle.

Q. Who gave them?

A. It proved to be the steamer Burlington.

Q. When you got that two blasts of a whistle, what did you see?

A. I saw the Burlington's headlight, its green light and the green lights of one barge astern of them.

Q. And the Burlington, where was she with reference to the lower end, the coaling part of Smith's dock?

A. She was somewhere in the neighborhood of the lower end of Smith's dock, apparently heading upstream.

Q. And the green light of the first barge, where was that?

A. It was astern of her, apparently heading towards or near the coal dock.

Q. Was it further out into the stream?

A. Yes, sir, further out in the stream. The Burlington was heading up to come in the coal dock.

19 Q. What did you thereupon do, if anything?

A. I answered him with two -lasts of the whistle.

Q. What order did you give on your boat?

A. Hard-a-starboard.

Q. Anything else?

A. I signalled the engineer to check the engine.

Q. You may state whether or not those orders were obeyed.

A. They were.

Q. When you got your helm starboarded, swung around over on the starboard helm, where were you with reference to the piles of the Kasota?

A. We were below them a short distance.

Q. Did you notice them in passing by them?

A. When I was just about abreast of them bound down I noticed them, but after I swung I didn't.

Q. How close did you pass to them and on which side?

A. We were on the American side, I should judge about a length of our steamboat.

Q. Under that starboard helm, how much did you swing?

A. At about right angles, and it might have been a trifle upstream.

Q. Did you give any orders to steady?

A. I did.

Q. What was your purpose in starboarding?

A. In going down to these spring piles I saw some lights on the Canadian side, on the port hand, but I could not at that time make out what they were, but having three blasts from the Burlington and seeing the headlights and the green light of one barge, I came to the conclusion it was the balance of his tow.

Q. What did you do after giving that order to starboard?

A. I took the glasses to ascertain where the end of the tow was.

Q. What did you ascertain?

A. When I found the tail end of the tow I was heading above them.

Q. What did the appearance there, as you could see with the glasses, indicate as to the space which was left between the tow, the nearest part of it, to the American and Canadian shore?

A. There appeared to be plenty of room for me over there.

Q. What did you do then?

A. I steadied the helm to follow the tow back.

20 Q. What to be done to the helm?

A. The vessels had to be steadied and then ported.

Q. What was the first that you saw of the New York that evening?

A. At or about the time I steadied the vessel, in looking down the river, I discovered a bright and a red light heading apparently up the river.

Q. And in what part of the river did you take the steamer to be that proved to be the New York—the lights you speak of now?

A. Yes, sir, toward the Canadian shore.

Q. I will call her the New York hereafter; in what part of the river did the New York then appear to be?

A. Appeared to be on the American side of his channel.

Q. What did you do then?

A. I gave him two blasts of the whistle.

Q. Was there an answer to that?

A. There was not.

Q. What distance, in your judgment, were you from the New York at the time you gave that signal?

A. I think about a mile.

Q. What was your judgment of that situation, what was it your purpose to do?

A. Having directed my course across the river, I concluded it was the best policy to hang on to that course and leave him on the starboard hand.

Q. He was, of course, on your starboard hand in the situation you have described?

A. Yes, sir.

Q. What did you next do?

A. I gave him a signal of two blasts.

Q. And at the time of giving that signal of two blasts, the second signal of two blasts, what lights did you see then on the New York?

A. The masthead, the red and the green.

Q. What is your impression, estimate, about the distance which separated the two vessels at that time; the second signal of two blasts?

A. Somewhere in the neighborhood of three-quarters of a mile, I think.

Q. Was there any reply to that?

A. There was not.

Q. What did you next do?

A. I sounded two more blasts of the steam whistle.

Q. And at the time of sounding this third signal of two blasts, what lights did you see on the New York?

21 A. The same lights.

Q. And three then?

A. Yes, sir.

COURT: What lights were you showing him then?

A. The bright light and the green light.

Mr. GOULDER:

Q. You were then proceeding on what course; how were you heading with reference to the Canadian shore or the trend of the river?

A. A trifle down the stream.

Q. How much downstream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Q. You may state whether you continued to observe this New York.

A. Yes, sir.

Q. Did you get any answer to your third signal of two blasts?

A. No, sir.

Q. Now, at that time, you may state whether you could or whether you did see this tow, the end of it, the stern barge, and if so, where it was in relation to your vessel and in relation to the Canadian shore?

A. The tail end of the tow at that time was a little forward of our starboard beam and apparently about three lengths of our vessel or thereabouts off from the Canadian shore.

Q. How far did she appear to be below you in the stream, the last barge in that tow?

A. She appeared to be the same distance, about three lengths.

Q. To that third signal did you get no answer?

A. No, sir.

Q. Will you give the movements of the vessel from that time until you came into collision?

A. Right after that I lost the green light, then sounded an alarm whistle of several short blasts, ordered my helm put hard-a-starboard and he came right along and hit us abreast of our foremast, on our starboard bow.

Q. At the time you sounded the danger signal on losing his green light, whereabouts was the New York with reference to the tail end of the tow?

A. He was somewhere about abreast or between the two last barges.

Q. Somewhere in that vicinity?

A. Yes, sir.

22 Q. As that vessel approached at the time of your losing the green light and from that time on, how did she appear to you to come up the river as to whether she came directly or was swinging either way?

A. I didn't notice the lights after that, not after sounding the alarm whistle.

Q. What, if any, indication in that regard did you get from what you could see of the boat herself?

A. Well, at the time he shut out his green light I was under the impression he was swinging on the port helm.

Q. And that indicated that he was, didn't it?

A. Yes, sir; and the manner in which he struck us, he must have been coming on the starboard helm.

Q. Can you tell the court how far you were from the channel bank when you struck?

A. We were about our length, probably a little more.

Q. From the Canadian channel bank?

A. Yes, sir.

Q. What did you do at the time of being struck, did you give any order to your engine?

A. Yes, sir; after he struck I gave him the long whistle to work her strong.

Q. How quickly did you sink?

A. About ten minutes, I think, from the time we were struck we were resting on the bottom.

Q. How quickly did your bow touch bottom?

A. I didn't feel that.

Q. When you say ten minutes you were on the bottom, your vessel had sunk and your stern had sunk in what depth of water?

A. I think it was 30 or 31 feet under our stern.

Q. Whereabouts was your vessel sunk with reference to Smith's coal dock?

A. It was apparently a trifle above the lower end of Smith's coal dock.

Q. Can you tell us anything about the speed of the New York?

A. No, sir; I don't know.

Q. How did it impress you as you came there as to whether she was running slow or fast?

A. He appeared to be coming pretty fast.

Q. Did you hear any engine signals on the New York at any time?

A. No, sir; I did not.

Q. Did you hear any after she struck you?

A. No, sir; I didn't.

By the COURT:

Q. What was your speed at the time you saw her coming there, when you thought her to be abreast of these two barges?

23 A. In coming down the river we were coming probably ten miles an hour, somewhere, $9\frac{1}{2}$ and 10 miles an hour.

Q. When did you check?

A. When the Burlington blew the two whistles, after I had answered.

Q. What was your speed after checking?

A. That I could not say, we generally check down to about half speed.

Q. Did you give the full-speed signal after checking and before the collision?

A. No, sir.

Cross-examination.

By Mr. WISNER:

Q. What is your age?

A. 38 years.

Q. Before you were master of the Conemaugh what were you sailing?

A. The Anna Young.

Q. The Conemaugh, on the occasion of this collision, was loaded with miscellaneous freight, I understand?

A. Flour, feed, bran, and so on.

Q. What is known as packing freight?

A. Yes, sir.

Q. And state whether she was loaded to her capacity?

A. She was loaded to the limit. We have a limit to our draft of water.

Q. And your draft was 15 ft. 3?

A. About that, yes, sir. We have our notice in our office in Chicago as to the limit at the Lime Kiln crossing.

Q. What was the speed of the Conemaugh in the lake?

A. Somewhere between $9\frac{1}{2}$ and 10 miles an hour, I think.

Q. And up to the time you answered the signal of two whistles from the Burlington you were running your ordinary speed?

A. Yes, sir.

Q. You passed the Kasota piles on the American side of them?

A. Yes, sir.

Q. Can you tell the court what part of the river those piles were in at that time?

A. They were located between the mouth of the River Rouge and Smith's dock; very near the middle of the river.

24 Q. So that the Conemaugh was going down at the American side of the middle of the channel?

A. Yes, sir.

Q. And that is the usual side, or usual place in the river for down-bound steamers?

A. That is the place I usually take.

Q. That is the course you understand to be the usual course down there?

A. Yes, sir; they go both sides.

Q. And steamers bound up usually take the Canadian side?

A. If it is clear, yes.

Q. What was the direction of the wind that night?

A. I don't remember. I don't think there was much or any.

Q. Did you keep any record of it?

A. No, sir.

Q. Did you keep a log on the Conemaugh?

A. Yes, sir.

Q. Have you got that log here?

A. I have not here.

Q. Where is it?

A. I presume it is in Buffalo. We turn them in every trip.

Q. What do you enter in your log?

A. The names of those that are on watch, the course, and the wind, and the speed and the revolutions.

Q. Every hour?

A. Yes, sir, and lights, passing lights.

Q. Light-houses and light-ships, you mean that you pass?

A. Yes, sir.

Q. And your log on the occasion of this collision, you entered an account of the collision, did you?

A. I did.

Q. And you haven't brought that log with you?

A. No, sir.

Q. Haven't been asked to bring it?

A. No, sir.

Q. Haven't seen it since you turned it in to the company?

A. No, sir.

Q. Did you keep a copy of it?

A. No, sir.

Q. At the time you made the entry in it, you knew the direction of the wind on that evening?

A. I don't know as I entered it.

Q. The atmosphere was clear?

25 A. Apparently, yes, sir.

Q. The stars were shining?

A. Yes, sir.

Q. But no moon out?

A. No, sir.

Q. Did you make a protest of this after the collision?

A. I made a statement.

Q. To whom?

A. To Mr. Whiting, our agent.

Q. Did you sign a protest?

A. No, sir, it was just to notify the manager that we had had a collision. That was about all there was to it.

Q. You know what a protest is, Captain?

A. I don't know as I do. They differ, I believe.

Q. Yes, indeed they do, but nevertheless they are all called protests, and I want to know if you signed one?

A. I made a protest to the local inspectors.

Mr. GOULDER: A wreck report?

A. A wreck report, that was all, sir.

Q. You reported to the agent of the line here, in writing, Mr. Whiting?

A. Yes, sir.

Q. To inform your owners of the collision?

A. Yes, sir.

Q. And you made a wreck report to the inspectors?

A. Yes, sir.

Q. Did you make no other written report?

A. There was a report to the collector of customs.

Q. Did you make no other than those three?

A. I think not.

Q. Then the only record that emanated from you or you made with regard to this collision in making those reports, you made about the agent of the line, to the custom-house officer and to the inspectors?

A. Yes, sir.

Q. Made them or delivered them?

A. No, sir, I have not.

Q. Is it your recollection that in so far as you went into the particulars of this collision in making those reports, you made about the same statement you have made here today?

A. I made no statement as to the manner in which the collision occurred, with the exception of the log. To Mr. Whiting I stated we had had the collision. That is about all.

Q. That we sometimes call protests. Now, what did you put in your wreck report?

A. The wreck report was drawn up by Mr. Shaw.

26 Q. One of the counsel in the case?

A. Yes, sir.

Q. That was to the inspector?

A. It was for the collector of customs, to the inspectors; it was merely to state the damage that had been done, the amount of the damage.

Q. Did the "Conemaugh" have a bridge?

A. Yes, sir.

Q. How high, with reference to the top of the pilot-house, was that bridge?

A. It was at the bottom of the pilot-house and over the top of the cabin, and the pilot-house sat on the cabin.

Q. And it extended from side to side?

A. Yes, sir.

Q. How high above the water was that bridge when the Conemaugh was loaded as she was that night?

A. It was better than twenty feet, I think.

Q. Did the Conemaugh have arches?

A. Yes, sir.

Q. Your screen boxes were on the arches, I believe?

A. Yes, sir.

Q. And how much below the top of the bridge?

A. They were above the top of the bridge.

Q. How much above the top of the bridge, I mean the floor of the bridge, not the rail?

A. Somewhere about five or six feet at least. Maybe more.

Q. Above the floor of the bridge?

A. Yes, sir.

Q. Nearly as high as the top of the pilot-house?

A. Nearly, not quite I don't think.

Q. And how far back from the stem were the screen boxes placed?

A. They were a little forward of amidships.

Q. How much forward of midships would you put them?

A. Somewhere about 30 feet; it might have been a little more or a little less. I never measured.

Q. You think your side lights were placed then in the neighborhood of 90 feet abaft of the stem?

A. Somewhere about that.

Q. And, Captain, you saw your side lights on that evening at Belle Isle?

A. Yes, sir.

Q. Under what circumstances did you notice them at that particular place?

A. I looked up to see they were all right before I got down in here, where we were apt to have too many vessels.

27 Q. Before you entered the river?

A. Yes, sir.

Q. Didn't you look at them before that?

A. Yes, sir; coming in off Lake St. Clair.

Q. That is at Belle Isle?

A. No, sir; out in the lake, coming from Grosse Pointe light-ship.

Q. Didn't you look at them a little before that?

A. I might have, but I don't recollect at present.

Q. Didn't you look at them when you entered the St. Clair river?

A. It was daylight at that time.

Q. Was it daylight before you got through the St. Clair river?

A. Yes, sir.

Q. It was dark before you got into Lake St. Clair, wasn't it?

A. I think not.

Q. When were the lights put out?

A. At sunset.

Q. Where was the Conemaugh at sunset?

A. I don't recollect.

Q. Can't you figure back and tell?

A. Somewhere on Lake St. Clair.

Q. You were on Lake St. Clair when the lights were put out, were you?

A. I think so.

Q. Now, Captain, the bridge of the Conemaugh, how far did that extend on either side of the boat with reference to the side, or rail of the boat?

A. It came out close to the side. The stanchions that held up the end of the bridge were on the inside of the promenade rail, fastened to it.

Q. And when you reached Belle Isle you looked at your side lights to see they were all right and found them burning brightly, and your masthead light, was that bright too?

A. Yes, sir.

Q. You came on down at a speed of 11 or 12 miles an hour?

A. Our speed outside was about 10.

Q. And you got a speed of two and a half miles an hour added to that by the current of the river?

A. Whatever the speed was; I presume that was it.

Q. Whatever that would increase it, was your speed coming down that night?

A. Yes, sir.

28 Q. Do you recollect meeting anything between Belle Isle and Woodward avenue?

A. No, sir.

Q. It was a pleasant, warm evening?

A. Yes, sir.

Q. More or less haze or smoke, I suppose, from the city?

A. Well, I didn't see much of it, sir.

Q. So that you could see clear on either side?

A. Yes, sir.

Q. Except where your vision was disturbed or obscured by bright lights, you had no difficulty in discerning lights on the water?

A. No, sir.

Q. You do find more or less difficulty in navigating by Detroit from the bright lights, do you not?

A. Yes, sir.

Q. It requires extraordinary and expert lookout to discern everything you may meet on the water?

A. We have to keep a pretty good lookout.

Q. Keep a brighter lookout than you do outside?

A. Yes, sir.

Q. You have no recollection of seeing the lights of any steamer between Belle Isle and the foot of Woodward avenue?

A. Not to my recollection.

Q. Did you check any at Woodward avenue?

A. No, sir.

Q. You didn't hold any communication with any boat from ashore?

A. No, sir.

Q. But stood on down a little toward the American side of the river, or about the middle?

A. About the middle, yes, sir.

Q. When you first made the Burlington, it was her masthead starboard light that called your attention?

A. No, sir; it was her signal whistles of two blasts.

Q. Was that the first intimation that you had from her?

A. Yes, sir.

Q. How far from her were you when that whistle came to you?

A. I think somewhere about half a mile.

Q. You must have been pretty near her stern barge?

A. Yes, sir.

— ?

A. The stern barge was on the Canadian side, and I was on the American side.

Q. About abreast of the stern barge?

29 A. I didn't find the tail end of the tow until after I had put my wheel hard-a-starboard. I didn't know how many he had in tow. I didn't know that was his tow until after he had blown.

Q. Did you see a vessel on your port hand near the American shore coming down with you?

A. With the aid of the glasses after I had rounded to.

Q. Didn't you see them before you got that whistle from the Burlington?

A. I saw some lights, but I didn't know what they were.

Q. What lights did you see?

A. Some bright lights.

Q. Did you conclude it was a vessel bound down with you?

A. I didn't come to any conclusion until the Burlington blew me two blasts, then I concluded it was the tail end of his tow.

Q. The Burlington had four barges in tow?

A. Yes, sir.

Q. And the length of the tow would be about half a mile?

A. Somewheres about there.

Q. Then in the neighborhood of the Conemaugh, but farther over towards the Canadian shore the rear barges of that tow would be nearly abreast of the Conemaugh when you received those two whistles?

A. Not when this fellow was over here.

Q. They would have gotten down a little below you then?

A. Yes, sir.

Q. Before he rounded in that way they would have been?

A. If the Conemaugh had been there.

Q. The Conemaugh was there, was she not?

A. No, sir, not before he rounded to.

Q. How far do you imagine he had rounded to when you received those two blasts?

A. He had got well over towards Smith's coal dock.

Q. But he hadn't opened to you his starboard light?

A. He had at the time he blew two blasts; I didn't see him before that.

Q. You stated a moment ago the first indication you had of the Burlington was two blasts of the whistle?

A. Yes, sir.

Q. You were keeping proper lookout on your boat?

A. Yes, sir.

Q. Then he hadn't opened his green light?

A. I didn't notice that. I was looking at these other fellows.

30 Q. Your lookout was confined to the Canadian side of the river?

A. Yes, sir.

Q. Were any lights reported to you from the American side, any side lights?

A. We didn't see any.

Q. Were any reported?

A. I don't recollect any being reported.

Q. But you were watching intently, so far as your individual self was concerned, the stern vessels of that tow over on the Canadian shore, to ascertain what they were before you got that signal from the Burlington? You made up your mind whatever it was, it was standing down the river with yourself, didn't you?

A. Yes, sir.

Q. And you blew it one whistle as a passing signal of a boat overtaking another and passing?

A. No, sir, I didn't.

Q. You knew there was a vessel, but didn't know what it was, but was satisfied it was passing down the river on a parallel course substantially with the Conemaugh?

A. Yes, sir, there were several of them, you know.

Q. You knew your speed was much greater than their speed?

A. It must have been or I would not have overtaken them.

Q. You realized that?

A. Yes, sir.

Q. And you knew you were about to pass them?

A. Going down that way, yes.

Q. Do you know the rule of the road which requires a vessel overtaking and about to pass another on the starboard side to blow one whistle?

A. No, I have not seen that.

Q. You don't know that rule? Did you ever hear there was such a rule?

A. No, sir, not to my recollection.

Q. And you state positively that you didn't blow to those vessels over on your port hand a signal of one whistle that night?

A. I state that positively, I didn't.

Q. And do you state positively that you did not blow a signal of one whistle just before you received a signal of two whistles from the Burlington?

A. Yes, sir.

Q. How far will the Conemaugh run at full speed with her helm put hard over in turning eight points?

31 A. Well, that depends a good deal too on the current; if you are going with the current, or if you are going across it.

Q. Then tell me, with the current running down that night as it was, how far she would run to make that turn?

A. I think she would make that turn in a couple of lengths, if not less.

Q. And you did turn her, I understood you to say, about athwartships of the stream?

A. Yes, sir.

Q. Wasn't that a pretty extravagant turn for the Conemaugh to go around that tow, with the tow going down as it was, and rounding to the American shore?

A. I had to do it, sir. This man was over there and he blew for

me to take that side, and if that was his tow that was the only thing I had to do that I could see.

Q. You knew how to stop the Conemaugh?

A. Oh, yes.

Q. You know that in time if her engine was reversed she will stop and back?

A. Oh, yes, sir.

Q. You didn't think of that on that occasion?

A. No, sir, I didn't. We did not think it was necessary.

Q. But it occurred to you that you had better put your steamer athwartships of the stream and run across the river?

A. Yes, go around the tow.

Q. What is the width of the river at Smith's coal dock?

A. Somewhere about five-eighths of a mile.

Q. How many feet do you understand it to be?

A. It might be somewhere about 3,000 feet, would it not?

Q. And apparently when you discovered the Burlington's tow consisted of four barges, you understood she had run down well on the Canadian side for the purpose of rounding to where she was rounded to when you made her out?

A. She was on the Canadian side of me yet.

Q. You were about mid-stream, a little to the American side?

A. Yes, sir.

Q. What was the distance from the Conemaugh to the track of the tow?

A. It would be a pretty hard matter for me to tell that, standing over there at that distance. It would be a pretty hard matter to make that out.

Q. Would it be any harder to make that out than it would be to make out the distance of the New York from the Conemaugh?

32 A. Yes, sir. I didn't give the exact distance only as it occurred to me.

Q. I don't want you to give me the exact distance to those barges, but I want your best judgment about it.

A. I should judge it was very near half the width of the river.

Q. Now, think, Captain, if you are right about that. Just consider and don't make any mistake, if you please, about that—the distance from the stern barges of the Burlington's tows to the Conemaugh. It was half the width of the river, you say?

A. Yes, sir, about that.

Q. And the Conemaugh was a little to the American side of the river?

A. Yes, sir.

Q. Then, these barges were very near the Canadian bank of the river?

A. They must have been on the Canadian side to me, say 1,500 feet.

Q. How near the middle of the river was the Conemaugh?

A. She was better than her length.

Q. Then these barges must have been within 250 feet of the Canadian bank of the river?

A. I should not think that.

Q. Haven't you stated that?

A. I don't know as I have.

Q. What is your judgment about it now? Figure back your answers and see if you have not stated that those barges were about 250 feet from the Canadian bank.

Mr. GOULDER: You have got two questions before the witness now. You have asked him his judgment about and you have asked him to figure out his answers and see if he has not stated that those barges were not 250 feet from the Canadian bank.

Q. Then, instead of asking you to figure back, I want you to consider and try to make no mistake about that distance. I want your best judgment, after due consideration, of the distance between the Conemaugh and the stern barges of that tow as you made them out with your glasses that night.

A. If we were at or about our length off from the stake on the American side of them, in coming down there, and the stakes are on the American side of mid-channel, that would throw us a little more than a length, whatever the distance is, further to the American side than mid-channel.

Q. That is self-evident. Now, do you say again, after your
33 attention has been called in the way I have called it, that those barges were half the width of the river on your port hand?

A. They appeared to be so; yes, sir.

Q. And they were a trifle ahead of your bow?

A. Below us.

Q. When you received that signal of two whistles from the Burlington?

A. I could not tell at that time just exactly where the tail end of the tow was.

Q. As soon as you discovered them they were there?

A. Yes, sir; that left them on the starboard hand at that time.

Q. When you received the two signals from the Burlington you did make out that she had a tow that she was rounding to, under a port helm. You made out those things, did you?

A. Yes, sir.

Q. And you made out that she had a consort that was also rounding to, as was shown to you by her green light?

A. Yes, sir.

Q. And you didn't know anything about the rest of her tow?

A. I saw the lights there. I didn't know what they were. I didn't know whether they were all hers or what.

Q. What lights did you see beside the starboard light of the Burlington and the starboard light of the first barge?

A. Bright white lights.

Q. You didn't see any vessels' lights that attracted your attention?

A. No, sir.

Q. The river is full of white lights down there, and for 20 miles down below there?

A. Yes, sir; we generally meet lots of them.

Q. You could not navigate your vessel by bright lights at night in that river?

A. Not without we were pretty familiar with them.

Q. You must have the colored lights in order to navigate your boat, because there are so many bright lights along about these waters from Detroit down?

A. Yes, sir.

Q. Now, I say again, when you answered those two whistles you had in your mind a steamboat and one vessel in her tow, as constituting the thing that had blown you two whistles?

A. Yes, sir; I knew he had one because I saw the green light. I am sure of that.

Q. You gave an order to your wheelsman to hard-a-starboard?

A. Yes, sir.

Q. Those boats were half a mile from you at that time?

A. Apparently; yes, sir.

Q. You gave the engineer an order to check?

A. Yes, sir.

Q. That blast of two whistles in reply to the Burlington, the order "hard-a-starboard" and the signal to check were given in the usual way?

A. Yes, sir.

Q. As a practical man would give them on his boat?

A. In my judgment, yes sir.

Q. Now, will you explain to the court, please, what inducement there was for those extraordinary moves on your part as the captain of the steamer at that time, viz., hardover your helm, and checking your speed with the only obstacle in the river that you saw or knew anything about, so far as your ship was concerned, being half a mile ahead of you?

A. I was positive of them. These others up here, I was not sure what they were, but I was positive this man had one vessel in tow at least, probably more.

Q. But you stated you knew nothing about these rear barges until after you gave those signals?

A. I was looking at those lights before I gave those signals and that is the reason I did not notice this man crossing over. I didn't notice this man until he blew me two blasts of his whistle, because I was trying to make out those lights.

Q. Had you received any report from any of your lookouts or mate about these two vessels before that time?

A. Not that I remember of.

Q. Was it your intention to turn across the stream as quickly as possible after receiving that signal down there?

A. Yes, sir.

Q. Not on account of that signal, but on account of these vessels over on your port helm?

A. Yes, sir.

Q. Was your boat checked?

A. Yes, sir.

Q. How do you know she was checked?

A. Because you can feel it when they check.

Q. Did you feel it?

A. I think I did. I could not remember positively now that I did.

35 Q. But you gave the signal?

A. Yes, sir.

Q. And if it had not been answered you think you would have known it by the motion or shaking of the boat?

A. Yes, sir.

Q. You were on the bridge at this time?

A. I was.

Q. Your lookout was forward?

A. Yes, sir.

Q. You had one lookout there?

A. Yes, sir.

Q. And only one?

A. I could not say whether there was anybody else with me or not.

Q. You had not ordered but one lookout on that occasion?

A. That is all.

Q. When did you send the second mate at the wheel?

A. Coming in off Lake St. Clair.

Q. You took him off lookout duty for that purpose?

A. His place was on the bridge with me.

Q. You took him off lookout duty to put him at the wheel?

A. To put him at the wheel, yes, sir.

Q. Was not his duty lookout duty?

A. He is a navigator, he is a licensed pilot.

Q. He stands his watch with the captain?

A. Yes, sir.

Q. But when not on watch he is lookout, isn't he?

A. No, sir, I don't understand it that way.

Q. Did you send him from the bridge to the wheel?

A. Yes, sir.

Q. What did you do with the watchman you had at the wheel with the wheelsman?

A. He had no watchman, he had a deck hand.

Q. You had two men at the wheel coming over Lake St. Clair?

A. Yes, sir.

Q. And you sent the second mate to the wheel about as you were entering the river?

A. Coming from the light-ship there.

Q. Coming in to Grosse Pointe channel?

A. Yes, sir.

Q. Why, is it necessary to have three men at the wheel?

A. No, but the class of men we carry as deck hands are not accus-

tomed to the handling of the wheel, and for that reason they are not much help to the wheelsman.

36 Q. Your wheelsman was a competent man?

A. He is, yes, sir.

Q. Now, the object of sending help to him is to furnish him with additional muscle to handle the wheel?

A. Yes, sir, we steer by hand.

Q. And the capacity of the men that you send in is of no sort of consequence, if he has muscle?

A. Oh, yes.

Q. Do you mean to say now you had a man at the wheel across Lake St. Clair and down the St. Clair river, and you took him away and put the second mate there at Grosse Pointe?

A. I do. I didn't take him away. I sent the second mate in to assist him. I didn't call him out of the pilot-house.

Q. What did you do with him, leave him there?

A. I did, but he went out afterwards, as I understood it, but it was unknown to me.

Q. You sent the second mate in there?

A. Yes, sir.

Q. And the helper at the wheel went out at his own motion?

A. I didn't know it, but I found out afterwards that he went out.

Q. What is the direction of the stream where this collision took place, by compass?

A. Well, it is a little to the westward of south; if you are steering to the southward or to the eastward of north.

Q. Now, sir, let us go back to your order hard-a-starboard and check your boat, swinging around rapidly under that starboard helm?

A. Yes, sir.

Q. Until you reached across the stream?

A. Oh, no, sir, until I had found the tail end of the tow.

Q. Didn't you know the tail end of the tow was there before you made the turn?

A. I supposed it was there somewhere, but I wanted to find out where it was.

Q. It was a bright night?

A. Yes, sir.

Q. You certainly could see 1,500 feet that night?

A. Well, it was nicer to make sure, I thought.

Q. Is it not a fact that you did not know whether there were any vessels there, and that the lights you saw might have been the shore lights?

A. No, sir, I did not think that, sir.

Q. You saw nothing but white lights?

A. That is all.

37 Q. You could not see the vessels?

A. No, I could not see the vessels.

Q. You could not see the vessels, but you could distinguish that the lights were moving?

A. I don't know as I did.

Q. And nobody had reported any vessel lights to you?

A. Not that I recollect.

Q. You swung around across the stream under a checked motion? What was your idea when you got across that stream, with your engine moving at half speed, as to other vessels coming up the river; what were they going to do?

A. I was to keep over to the American side and give them plenty of room.

Q. Suppose you crossed their path to go over there too close aboard to get by?

A. If I could cross it it was all right.

Q. And if you could not it was at your peril?

A. No, sir, there was no doubt in my mind but what I could cross their path.

Q. Whose path are you *crossing* about?

A. I am talking about the steamboat that I saw down below there, at that time, after I had starboarded the wheel.

Q. I have not got that far yet. I am swinging hard-a-starboard. I ask you as a navigator, with your ship swung around across the stream, and your starboard side covering everything in the river below you, what did you expect vessels coming up were going to do?

A. I was not thinking of those coming up when I was swinging.

Q. You were not thinking of those at all?

A. No, sir.

Q. And when you got around and steadied yourself, you looked down through those barges of the Burlington's tow and saw the port light and masthead light of the steamboat?

A. Yes, sir.

Q. Who reported it to you?

A. I saw it myself.

Q. Who reported it to you?

A. I don't know as anybody, still the lookoutsman might have reported it, but I don't recollect it now.

Q. Was your mate on deck then?

A. No, he was at the wheel.

Q. You received no report from anybody?

A. Not to my recollection.

Q. But you saw then on your starboard hand the mast-head and port light of an up-bound steamer?

A. Yes, sir.

Q. For the time being, your attention was taken off those vessels that you were trying to get around on the Canadian side?

A. I was above them.

Q. How far below the line of the barges do you think the New York was when you made her port light and masthead light?

A. I could not say exactly.

Q. Don't try to say exactly.

A. About as far as we were from the steamboat then, I should think, from the steamer Burlington.

Q. About half a mile?

A. I think so.

Q. Now, Captain, it must have occurred to you at that time then, that the New York would have the obligation thrown upon her of keeping out of the way of these barges?

A. Oh, no, I don't say so.

Q. Not at all?

A. No, sir, I don't think so.

Q. It would not be necessary for her to check or stop or port if her course led into this line of barges?

A. I could not say as to that.

Q. Didn't you take that into consideration at all?

A. No, sir.

Q. Didn't think of that?

A. No, sir, there was another man navigating that boat, sir; not me.

Q. You were the captain of the Conemaugh?

A. I was on the Conemaugh.

Q. You were navigating the Conemaugh?

A. Yes, sir.

Q. And you didn't take into consideration at all what possibly must be the movement of the New York in coming up there?

A. No, sir.

Q. You didn't think of that.

A. No, sir.

Q. Your sole thought was to hard-a-starboard, check down and get around the tail of this tow if possible?

A. At that time I was steadying; I had quit swinging by that time on that hard-a-starboard helm.

Q. The tow was then in about the relative positions of these models?

A. No, they were about in this shape (placing models).

39 Q. The distance between the rear barges of the tow and the Canadian shore had not been lessened any?

A. No, I think not.

Q. And that distance was not lessened any until after you had passed by those barges?

A. I don't know as it was lessened any then.

Q. When you steadied on your new course across the river, where was the stern barge with reference to her bearing to the Conemaugh?

A. Coming around about like that, I should think (placing models).

Q. About two or three points on your starboard bow?

A. About two points, I think.

Q. And you had run them half the distance from where you started over to the line of your course?

A. Nearly that.

Q. So that she would be about 700 feet from you, or 800 feet? Is that right?

A. Well, somewhere near that.

Q. Now, don't let us have any mistake hereafter about that.

Don't for a moment think you haven't had ample opportunity to consider that matter, for I think it is very important. When you had steadied, the rear barge in the tow bore about two points on your starboard bow, distant about seven or eight hundred feet?

A. Somewhere about 700 feet, I should think.

Q. And at that time that barge was as near the Canadian bank as she had been at any time?

A. Apparently.

Q. What was the speed of your boat at that time?

A. I could not say.

Q. How long since you had rung your checking signals, at the time you steadied, with that barge bearing two points on your starboard bow, distant 700 or 800 feet?

A. I don't know.

Q. You would run about seven or eight hundred feet?

A. I don't know. She swings very quick.

Q. Give me your best judgment and think of it with due consideration before you answer it, please? You have stated that the Conemaugh answered with two signals; she was then running her full speed, the order hard-a-starboard was given, the order to check was then given, and we find her having covered half the distance between the stern barge of the tow that she was trying to get around and her starting point. Now, how long a time do you think intervened between the giving of the checking whistle and when you found yourself here with your helm steadied?

40 A. I don't know how long that would take us, because she swings very quickly.

Q. It would take but a very short time?

A. Yes, sir.

Q. Do you know how fast she would be running a minute at her full speed of 11 miles an hour?

A. She would be going a mile in about five and a half minutes, wouldn't she?

Q. She was running then a mile in about five minutes and a half, and she had with that speed and the momentum she would have from that speed and her weight, had covered only seven or eight hundred feet? That is the only way we can get at it, you think?

A. Yes, sir, I think she went somewhere about that.

Q. Do you think her speed was half reduced?

A. I think it was.

Q. What was your signal to the engineer?

A. Three blasts of the whistle.

Q. What did that mean?

A. To check the engine.

Q. To what?

A. If at the first check he does not check slow enough we give him another and he checks again.

Q. You don't give the second one.

A. No, sir.

Q. Don't you have an understanding when you give the first signal to check?

A. No, sir, they generally check her down about half speed.

Q. You don't have any understanding about that?

No answer.

Q. How did this red and masthead light that you made bear off the Conemaugh's starboard side?

A. Well, it was nearly abeam.

Q. Nearly abeam?

A. It might have been a little forward of beam.

Q. Did you hear the Burlington and New York exchange whistles?

A. I didn't.

Q. You don't know whether they did or not?

A. No, sir, I don't.

Q. Well, now, I understand, Captain, about the time you steadied you made the port light and masthead light of what proved to be the New York?

A. Yes, sir.

Q. How were you heading at that time with reference to the stream?

A. About at right angles or a trifle upstream.

41 Q. Your starboard light then ought to have been visible to the New York?

A. Yes, sir.

Q. And your masthead light?

A. Yes, sir.

Q. And you blew two whistles?

A. Yes, sir.

Q. And continued to run on across the river?

A. Yes, sir.

Q. And soon you opened her starboard light?

A. Yes, sir; at or about the time I blew the second blast of two whistles; it might have been a trifle before or a little bit after, but at or about that time.

Q. You blew her two whistles with her port light and her masthead light showing to you?

A. Yes, sir.

Q. She seemed about the middle of the stream?

A. A little on the American side of it.

Q. A little on the American side of the middle of the stream?

A. I think so.

Q. Captain, do you understand that you have put her considerably over to the Canadian side of the stream before this?

A. I didn't understand so, sir.

Q. She was abeam of you, you say?

A. Somewhere about that.

Q. The Conemaugh had run nearly half way between the middle of the stream and the Canadian bank, you say?

A. Nearly.

Q. This vessel was right abeam of you, you say?

A. Nearly.

Q. You were heading certainly across the stream and possibly a little upstream?

A. At the time I steadied we allowed her to drop back a little to follow the tow.

Q. And this boat was abeam of you showing you her port light and masthead light?

A. Yes, sir.

Q. You understand she was on the American side of the middle of the stream?

A. Yes, sir.

Q. Isn't that absolutely impossible?

A. No, sir.

Q. Don't you think it is?

A. No, sir; I don't.

Q. When you gave her the two whistles, what did you expect from her; what was your thought then?

42 A. That we would pass starboard to starboard.

Q. What did you expect from the New York?

A. Expected her to pass on her starboard hand and I would pass on his starboard hand.

Q. Did you expect him to starboard his helm?

A. No, sir.

Q. Did you expect him to port his helm?

A. No, sir.

Q. Did you expect to check his boat?

A. I didn't.

Q. Or stop his boat?

A. No, sir.

Q. But you expected him to keep along on that course with the speed he was then holding?

A. Yes, sir.

Q. And you didn't expect anything else from him?

A. No, sir.

Q. You knew that was his right?

A. Yes, sir.

Q. You knew it was your duty to keep out of his way?

A. Yes, sir.

Q. And you took that position because you firmly believed that there was room enough to get across his bow before he could reach you if he kept in that way?

A. Yes, sir.

Q. Did it occur to you—I will ask you again—at that time when you were considering the rights of the New York, and your own obligation, what was to be done with this string of three barges between you and the New York?

A. I had got down with them, I had found the tail end of them.

Q. But what did you think the New York was going to do with them?

A. He was going to have plenty of room to pass between us and the tow.

Q. Then your notion was that the New York was to come on and pass between the Conemaugh and the rear barges of the tow?

A. Yes, sir.

Q. You didn't get any reply to those two whistles?

A. No, sir.

Q. How long did you wait before you repeated them?

A. Not a great while.

Q. How long?

A. I could not say, but it was certainly less than a minute, I should think.

Q. How long do you usually wait for a reply to a passing signal?

43 A. It depends upon the position you are in.

Q. When the boats are a mile apart, how long do you wait?

A. Well, it depends a good deal upon circumstances; less than a minute.

Q. You usually wait less than a minute?

A. No, sir; I say at this time probably a minute or less than a minute.

Q. How much less?

A. I could not say. Place yourself in any position, when you are down there and trying to clear this tow, you would not take your watch out and look at the time, would you?

Q. Probably not, and I don't know as I can place myself in your place. I am coming as near to it as I can by investigating your conduct. You blew two whistles and your mind was perfectly easy; you were not disturbed when you blew those two whistles?

A. I was cooler than the time I put the wheel hard-a-starboard.

Q. You had got on a course that would certainly clear you, so far as the stern barges were concerned?

A. Yes, sir.

Q. So any anxiety you might have had was disposed of when you had accomplished that? Isn't that so? Any anxiety you may have had with reference to that tow and her barges you had gotten rid of by getting your boat around so that you would steer clear of them?

A. Yes, sir.

Q. When you blew the New York that signal of two blasts your mind was perfectly easy?

A. Just before I blew it, no.

Q. Blowing it did not disturb you?

A. I had to get out of his road then. He had the right of way.

Q. He was a mile away?

A. At that time he was not showing only his red light.

Q. Did that induce you to repeat your signal any quicker than you would if he had been showing you both his lights?

A. Yes, sir.

Q. Then you hadn't waited as long as you usually wait?

A. No, I think not.

Q. And you repeated that signal of two blasts to him, and about that time he showed you both of his lights?

A. Yes, sir, at that time I got a glimpse of both.

44 Q. Did he open it or did you open it?

A. It appeared I was opening it.

Q. You think you were opening it?

A. Yes, sir.

Q. Now, the failure of the New York to answer your first two blasts did not cause you to make any change in the course of your vessel?

A. No, sir.

Q. Now, in the speed of your vessel?

A. No, sir.

Q. Now, in the condition of her helm. You didn't make any change on account of his failure to answer your first two whistles?

A. No, sir.

Q. And you blew him another two about the time you opened the starboard light?

A. Yes, sir.

Q. Standing on the same course across the river?

A. I think by this time we had started to follow the tow back again.

Q. Had you steadied?

A. Steadied, and after they steadied, followed the tow back again.

COURT: You had ported when you sounded the second signal of two blasts?

A. Yes, sir, we swung the port wheel slow.

MR. WISNER:

Q. When did you give that order to port?

A. Soon after steadying, when I found we were heading up the river above the tow, then I sung out, steady, follow them back, follow the tow back so as to keep that distance off of them.

Q. With reference to blowing the first two blasts, when was the helm ported?

A. It was at or about that time.

Q. Then, in fact, when you were in that condition or anxiety of mind, seeing the port and the masthead light of the propeller New York, and realizing your duty to get across his bow, get out of his way, you ported your helm instead of keeping on and getting out of his way? Is that what you mean to say now?

A. Then I was swinging slowly under a port helm.

Q. When you opened his starboard light, you knew how he was heading, didn't you?

A. Yes, sir.

Q. And you blew him two whistles again?

A. Yes, sir.

45 Q. And he didn't answer?

A. No, sir.

Q. Did you change your helm?

A. No, sir.

Q. Did you change your speed?

A. No, sir.

Q. Did you change your intention in any way?

A. No, sir.

Q. Then his failure to answer you didn't make any difference with the navigation of your boat, did it?

A. No, sir.

Q. You stood on about the same length of time, I suppose, then you repeated your signal?

A. Somewhere about the same.

Q. Making the third signal?

A. Yes, sir.

Q. Hadn't you got clear of the barges by that time?

A. No, sir.

Q. Where were you when you repeated your signal for the second time, which would be the third signal?

A. Then we were pretty nearly abreast of the tail of the tow.

Q. Where was the New York?

A. I could see the New York then. He appeared to be in here.

Q. Between the two stern barges?

A. He seemed to be coming in that way. He might have been up in here.

Q. Between the second and third from the end?

A. Yes, sir.

Q. You hadn't crossed his lines yet?

A. I had both lights open.

Q. But you hadn't crossed his bow when you blew the third signal to him?

A. No, I think not.

Q. He didn't answer that?

A. No, sir.

Q. He kept coming right along?

A. Yes, sir.

Q. Seemed to be pretty close to the tow, didn't he?

A. He appeared to be.

Q. And his failure to answer your whistle made no difference in the navigation of your boat?

A. It was right about this time somewhere between the third signal and the alarm signal when I sung out hard-a-starboard steady, then hard-a-starboard.

Q. I am just now navigating with you on the Conemaugh, 46 having twice had my signals of two signals ignored, blowing a third signal to the New York, at which time you hadn't yet passed the stern barge in the tow, and the New York seemed to be between the second and third barges, holding pretty close to them?

A. Yes, sir.

Q. She didn't answer that signal?

A. No, sir.

Q. You didn't change your course then?

A. I think it was about that time we steadied.

Q. About that time you starboarded?

A. I said steadied.

Q. Steadied from a port helm?

A. Yes, sir.

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm?

A. Yes, sir.

Q. He was then showing you both his side lights?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming onto it then about that time.

Q. Now, Captain, if you hadn't steadied from the port helm you think you would have swung down on the port side of the New York?

A. Yes, sir.

Q. Then your steadying from a port helm there did not make any difference with the collision?

A. No, sir.

Q. Did you steady?

A. Yes, sir.

Q. Did your vessel stop her swing?

A. I believe so.

Q. And then you blew him a fourth signal of two whistles?

A. No, sir; that was an alarm whistle, several short blasts.

Q. You only blew him three signals of two whistles then?

A. That was all.

Q. The last one was blown just about as you were entering on the stern of the rear barge, and as you passed the stern of the rear barge that I understand you to say, that the green light of the New York disappeared, shut out?

A. Somewhere between the third and the alarm whistle; yes, sir.

Q. Somewhere between the third whistle and the alarm, and before or after you steadied?

47 A. I think it was right after. I am not positive, but I think it was right after.

Q. What induced you to steady?

A. Because I was not opening him lights quite as quick — I ought to, and losing this light led me to believe they were altering their course.

Q. Did it occur to you that perhaps you were swinging away from that light?

No answer.

Q. You thought he had ported?

A. I thought he had.

Q. And you thought so because you lost the green light?

A. Yes, sir.

Q. Did you ever have it open bright at all?

A. Quite full.

Q. You had it simply around outside rays of light?

A. I got the edge of the light at the time I blew the third whistle, the light itself.

Q. And when the light shut out you blew the alarm?

A. Yes, sir.

Q. And you blew the alarm as you came by the stern barge?

A. Yes, sir; I was by the stern barge then I think.

Q. Does it occur to you right here—think of it please and give it all the thought you can; relate your mind back to this occasion and see if you have not been a fearfully long time navigating 700 feet from the time you commenced blowing whistles to the New York? Does it occur to you that such is the fact? You have only run about 700 feet, you have blown three signals of two blasts to the New York and ported your helm; you have steadied your helm, and you have blown an alarm signal. Now, do you think you did all those things in that length of time?

A. The space may have been greater. The distance we went over may have been greater.

Q. When you blew the alarm and pulled out by the stern of the rear barge, you saw the New York coming into you?

A. After I sounded the alarm, yes, sir. It was after that.

Q. Where were you when you sounded the alarm?

A. I had passed the stern barge.

Q. You were by it then?

A. Yes, sir; and then swinging on the starboard helm. At first the helm was put starboard, being under check she might not have got much way.

Q. We haven't heard about that before. You had only
48 steadied on the port helm?

A. It was just previous to the alarm whistle that we put her wheel starboard.

Q. You starboarded then when you saw the green light disappear?

A. Steadied, that was the time that was given.

Q. That is what I thought you said. You steadied when the green light disappeared on the New York?

A. Yes, sir; that was right after the third whistle.

Q. Now, when did you starboard?

A. Somewhere between that and when the alarm whistle was sounded.

Q. What was the interval?

A. I don't know.

Q. Why did you starboard?

A. Because I had lost the light.

Q. You lost it when you steadied?

A. It was about that time.

Q. When you came out there and blew your alarm, you saw the New York coming right after you, didn't you?

A. I saw her coming pretty fast.

Q. Right into you?

A. He appeared to be so, sir.

Q. At what angle did he strike you?

A. I should think it was something greater than 45 degrees—that is, from the line of our keel (placing models).

Q. You think about four points off your bow?

A. Something like that, and it struck just abaft of the place where

I was standing. Our bridge is well forward. It fetched us somewhere in about there (indicating models).

Q. Why did you starboard your helm the last time?

A. I tried to get over as far as I could out of his road, to give him all the room possible.

Q. He struck you 30 feet abaft of your stem?

A. I think it was something about that.

Q. And he had 220 feet to go by him before he would be clear of you?

A. Yes, sir.

Q. You didn't hope to get away from him then?

A. I thought there wasn't much chances of it.

Redirect.

By Mr. GOULDER:

Q. I will just complete Mr. Wisner's line of examination by asking you to state why you didn't reverse.

A. After he had signaled?

49 Q. Yes, sir; in that situation tell the court what your judgment about it was, and why you didn't reverse?

A. I had signified to this steamer the course I was taking. Had I stopped here and he had seen fit to answer my whistle, I would have been in his road. I was coming with our current at that time, drifting with the current.

Q. Now, a single question about the protest: Do you remember anything about a protest being prepared by Mr. Shaw, which was for use with the insurance company. Do you recollect any such paper as that, and being signed by you and other members of the crew?

A. I have forgotten that, sir.

Q. What kind of a sound did your whistle give out that night?

A. It appeared to be a good, clear sound.

Q. Was it a large or small whistle?

A. A large whistle.

Q. A whistle that under ordinary conditions, or such conditions as existed that night, ought to be heard about how far away should you say?

A. At least not less than a mile and a half, I think.

Recross.

Mr. WISNER:

Q. What does the rule of the inspectors provide when a steamer which has signalled to another by reason of failure to get reply-s, or getting the wrong reply, does not understand what the other intends to do, what does that rule require?

A. It requires that we shall report them.

Q. It requires the steamboat to report him when he gets ashore, if he is not sunk by a collision?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

GEORGE PRIEST, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. You were the lookout on watch on the Conemaugh at the time of this collision, were you?

A. Yes, sir.

Q. How long have you sailed?

A. Well, since I was five or six years old.

Q. How old are you now?

50 A. 24.

Q. How much of that time have you sailed on the lakes?

A. Two months.

Q. That is, at the time of this collision?

A. Yes, sir.

Q. That was your first season on the lakes?

A. Yes, sir.

Q. Where did you go on lookout; whereabouts was your vessel?

A. Just coming in from Lake St. Clair, about six o'clock.

Q. From that time until the time of this collision, where did you keep your lookout?

A. As far forward as I could stand, right abaft the anchors.

Q. On the upper deck?

A. On the upper deck.

Q. And the captain, where was he?

A. On the bridge.

Q. Aft of you and up higher than you?

A. Yes, sir.

Q. Do you remember anybody else being on the forward deck around where you were, on that same deck?

A. Nobody at all, sir.

Q. Do you know who were in the pilot-house at the wheel?

A. Well, I know the wheelman was there.

Q. Do you know where the second mate was?

A. I cannot say, sir. I didn't see him go in there.

Q. You don't recollect where he was?

A. No, sir.

Q. You came on down past Detroit, and do you remember some distance down here below Detroit some piles out there in the river with a light on them?

A. Yes, sir.

Q. Do you remember passing those?

A. Yes, sir.

Q. Can you tell us how, somewhere about how far away you passed from them?

A. I should say it was a boat's length, about our length.

Q. And left them on your starboard or port bow?

A. On the American side.

Q. Left them to port, then?

A. Yes, sir; on our port.

Q. Down along in there, you may state if you recollect the fact of a steamer blowing you two blasts?

51 Objected to as leading. Question withdrawn.

Q. Did you hear any signal from the boat which proved to be the Burlington?

A. Yes, sir.

Q. What was that signal?

A. A signal of two blasts.

Q. Where was she at the time of blowing that signal?

A. She was rounding into Smith's coal dock, as far as I could see.

Q. Your boat was where?

A. Coming by the Kasota's piles.

Q. Let me ask you whether you saw any lights on that boat.

A. I saw a green light and a masthead light.

Q. Did you see them before or after the signal was sounded?

A. I saw the masthead light before the signal was sounded.

Q. Did you, or did you not, report it to the captain, as you remember?

A. Just as I was going to report it he sounded two blasts and our captain answered him.

Q. On the Burlington sounding that signal, tell me all that was done on your boat as far as you know.

A. Well, I heard the order given to starboard the helm and I heard him give the order to steady and follow the tow around.

Q. You may state whether any signals were given of any kind, and if so, what.

A. The signal to the New York then, after we got the order to starboard.

Q. You are getting beyond my point. At the time or about the time of the Burlington's blowing her two blasts, was any signal on your boat given by whistles, if you remember?

A. Not that I can recollect.

Q. Did your boat answer the Burlington's signal?

A. Certainly.

Q. With what?

A. With two blasts.

Q. Two blasts of the whistle?

A. Yes, sir.

Q. Do you remember any order or signal given at any time before the collision by your engine whistle?

A. Yes, sir, I heard the whistle to check.

Q. When did you hear the signal to check?

A. That was when we were nearly abreast of the last barge in the tow.

52 Q. That is the way you remember it, is it?

A. Yes, sir.

Q. Now, under that order to starboard, given as you say at the

time of answering the Burlington, how much do you recollect your vessel swung, how nearly ahead across the river did she head?

A. She was heading right across and a little up, if anything.

Q. Now, what was the next order that you heard to your wheel, if you heard any further?

A. Well, it was to follow the tow around.

Q. And did you after that hear any other order to your wheel?

A. Yes, sir, I heard the order to hard-a-starboard.

Q. And was that all you heard in the way of orders to the wheel?

A. That is all.

Q. Do you remember whether your boat with her big whistle gave any signals to anybody after you starboarded your helm, as you say, to swing around there athwartships?

A. Yes, sir.

Q. What was the first signal that you heard?

A. Two blasts.

Q. And how many signals of two blasts did you hear her give?

A. Three.

Q. Did you hear her give any other signal, hear any other signal with her big whistle than two-blasts signals?

A. Yes, sir, short, small blasts.

Q. And that is what kind of a signal?

A. Danger signal.

Q. Did you see the New York, or this propeller which proved to be the New York before the collision?

A. Yes, sir.

Q. When did you first notice her?

A. I first noticed her when we rounded the Kasota's piles, when we got to starboard.

Q. What lights did you see on her as you now recollect, the first time you observed that vessel?

A. I saw all three of her lights, two colored lights and masthead lights.

Q. When was that with reference to the first signal of two blasts of your vessel? That is to say, was it at the time the first signal was blown or before that or after that?

A. It was after the first signal was blown.

Q. When was it with reference to the time the second signal of two blasts was blown, at that time or before or after that?

A. I lost the red light before our second signal was blown. I only saw the green light.

Q. At the time of the third signal of two blasts, do you remember what lights you saw?

A. I saw the green light again.

Q. And how about the red at that time?

A. The red was shut off.

Q. At the time of the third blast?

A. Yes, sir.

Q. At the time of the danger signal what lights do you remember of seeing on the New York?

A. The red light.

Q. Any green?

A. No, sir.

Q. Did you see while you were going over there at any time the last barge, what we call the tail of this tow of the Burlington's?

A. Well, I saw some dark object there, and I made them out to be barges by their lights. They had white lights aft of the cabin, binnacle lights or something like that.

Q. And dark objects?

A. Dark objects on the water.

Q. When you gave the danger signal on your boat which was nearer to the Canadian shore, those dark objects, that is, the tail of the tow, or the Conemaugh?

A. The tail of the tow, as far as I could see.

Q. How far below you did those barges then seem to be?

A. Well, I should say they seemed to be about three or four of our boat-lengths from us.

Q. Now, looking down there, can you tell, Mr. Priest, give us any idea about how far out the tail of the tow was from the Canadian shore?

A. I cannot exactly say, but there seemed to be a large expanse of water between the tail end of the tow and the shore, enough for the passage of two ships. It seems to me to be so.

Q. Well, as compared with the distance from the Conemaugh down to the tail of the tow, how was the distance between the Canadian shore and the tow?

A. I cannot say exactly.

Q. Did you hear any answer from this New York?

A. None at all.

Q. When you got past the tail of the tow, whereabouts did the New York appear to you to be with reference to those barges?

54 A. I should say she was coming towards the third barge in the tow, showing us the green light.

Q. Showing you the green light then or the red light?

A. The green light.

Q. Did she show you the red light at that time?

A. Just after that.

Q. You mean the three tow barges next to the last of the tow barges?

A. Yes, sir.

Q. I will state here, to get it into the record, that the name of the last barge in the tow was the Ferguson, and the name of the next in front of her, the third tow barge, was the Amaranth. Now, from the place you saw the New York, at that time, how did she, to your eyes, seem to approach your vessel, as to whether she came straight or whether she wobbled?

A. She seemed to me to be altering her helm.

Q. How did she go?

A. Her port helm seemed to run right in the Canadian shore.

Q. When she struck you how did she seem to be coming?

A. Straight into us. I saw both her lights then.

Q. And how close into the shore did it seem to you your boat had got at the time you were hit?

A. Oh, I should think we were nearly aground, according to my idea.

Q. Did you notice when you touched the ground?

A. No, sir, I cannot say I did notice it.

Q. As lookout on your vessel, what, if any, attention did you have to give to your lights?

A. To see if they were burning and to report them if they were not.

Q. How frequently would you say that you looked at the lights?

A. Looked very frequently; looked very often. I would cast my head around and see if they were burning, and look up to the masthead light.

Q. You were so performing your duty this evening of the collision?

A. Yes, sir.

Q. So far as you know, what was the condition of the lights, the masthead, the red and green lights on your boat, down to the time of the collision?

A. Burning brightly.

Q. You may state if you know what the condition of your masthead light was after the collision?

A. It was out.

55 Q. And if you know, state the condition of your red and green lights after the collision?

A. They were burning brightly.

Court then took a recess till 2.30 p. m.

2.30. P. M.

Cross-examination.

By Mr. WISNER:

Q. Where is your home?

A. I live anywhere.

Q. You live in your hat?

A. Anywhere where I can make a living.

Q. Haven't you any fixed place of residence?

A. No, sir.

Q. I judge from what you said in the first part of your examination that you had grown up on the water?

A. Yes, sir.

Q. What water?

A. Salt water.

Q. What kind of craft?

A. The first ship I was in was the Trafalgar, sailing from London to the Colonies and Australia.

Q. And that was when you were very young?

A. Between five and six years old.

- Q. You followed the salt water until you grew to manhood?
A. Yes, sir.
Q. On sailing vessels entirely?
A. Sailing vessels and steam, too.
Q. Steam vessels on the salt water?
A. Yes, sir.
Q. Was your father a navigator or sailor?
A. Yes, sir.
Q. Were you with him in your boyhood days?
A. Yes, sir.
Q. And most all of your life, from the time you were five or six years old, has been spent on the water?
A. Yes, sir.
Q. Can you box the compass?
A. I think I can, sir.
Q. Can you box it both ways?
A. Yes, sir.
Q. You know how to steer?
A. Yes, sir.
Q. What are the usual orders given for moving the rudder?
A. Port or starboard.
56 Q. When the navigator gives the order to port, what does he mean?
A. It is according to how your rudder chains extend, whether across or straight.
Q. And if they run straight?
A. Get your order to starboard you put your wheel apart.
Q. Does the word starboard refer to the wheel then?
A. Yes, sir.
Q. And when you say starboard you mean port, and when you say port you mean starboard?
A. Yes, sir.
Q. Did it ever strike you that was a little funny; that they should mean just the opposite of what they said?
A. No, sir.
Q. How long have you been on fresh water?
A. I was sailing with this captain two months, and that was the first I was on fresh water.
Q. And you shipped on the Conemaugh in what capacity?
A. As lookoutsman in Buffalo.
Q. Up to that time had you sailed at all on inland waters?
A. No, sir.
Q. Your experience has been entirely upon the salt ocean?
A. Yes, sir.
Q. And had you performed lookout duty on the ocean?
A. Yes, sir.
Q. Stationed where on your ship?
A. As able-bodied seaman before the mast.
Q. But when on lookout duty where were you stationed on your ship?

A. In the fore part of the ship. In bad weather on the bridge along with the mate.

Q. How many trips had you made up through the rivers before the collision?

A. Well, I think it must have been three or four, I am not certain which.

Q. And you had run between Buffalo and what port?

A. Chicago.

Q. That was your constant run, was it?

A. Yes, sir.

Q. What time did you go on watch that night?

A. Six o'clock.

Q. What was the length of that watch?

A. Until one o'clock next morning.

Q. From six at night until one o'clock next morning?

57 A. Yes, sir.

Q. Seven-hour watches?

A. Yes, sir.

Q. Where was the Conemaugh at six o'clock when you went on watch that morning?

A. In Lake St. Clair, I think, just coming down towards the river.

Q. What were your duties as lookout?

A. To report everything I saw and everything I heard, and to see that the side lights and the masthead lights were burning brightly, and if not to report them.

Q. And you didn't report the condition of the side lights unless there was something the matter with them?

A. No, sir.

Q. You were not called upon to report them once an hour that they were all right, or whatever is their condition?

A. No, sir.

Q. Do you recollect of noticing the condition of the side lights as you came down the river?

A. Yes, sir.

Q. Where was the green light placed?

A. On the starboard bow, on top of the arch, the arch that runs fore and aft.

Q. You don't mean to say it was on the starboard bow, but it was on the starboard side of the ship?

A. That answers the same purpose. In vessels that I have always been in they carry them on the starboard bow and I always make use of that expression.

Q. Your light, however, was considerably abaft of the bow?

A. Yes, sir.

Q. Nearly amidships?

A. Yes, sir.

Q. How did you get to it, how could you get to it?

A. By crossing the bridge.

Q. Was it near the bridge?

A. Well, it would not take but two or three steps to get to it.

Q. Aft the bridge?

A. Yes, sir.

Q. What would you walk on?

A. Promenade deck, they have there to walk on.

Q. Could you reach it from the hurricane deck?

A. No, sir, you have to climb a small ladder of five or six steps.

Q. It would be well out on the side of the ship, wouldn't it?

58 A. Yes, sir, stationed on what we call the light-board.

Q. The screen-board?

A. Yes, sir.

Q. It is a box?

A. Yes, sir, we always call them light-boards.

Q. And the light-boards or screen-boards situated on the arch in that way, were as far outboard as the arches would permit them to go?

A. Yes, sir.

Q. And the only way you could reach them was by means of the hurricane deck and a short ladder?

A. Yes, sir.

Q. Did you handle the lights at all?

A. No, sir.

Q. Did you know what kind of lights they were?

A. Yes, sir.

Q. What kind of lights were used on the Conemaugh?

A. Two colored lights, green and red, and masthead light.

Q. I mean, Mr. Priest, what class of lanterns were used.

A. It was a big brass lamp, I should say, that is the frame of it.

Q. You were familiar with them?

A. Yes, sir.

Q. As you came by the city of Detroit that night on the Conemaugh, you saw ahead of you and on either hand a great mass of bright white lights, didn't you?

A. Yes, sir.

Q. You were not able to distinguish whether those lights were on the shore or on the water?

A. No, sir.

Q. You saw some colored lights?

A. Yes, sir.

Q. Both on the shore and the water, didn't you?

A. Yes, sir.

Q. And you were not able to distinguish these lights that were on the shore or on the water?

A. No, sir.

Q. And in that condition of things at your station somewhere forward of the break of the hurricane deck, you were standing watch as lookout?

A. Yes, sir.

Q. About how far aft of the stem of the Conemaugh?

A. Three or four, about four feet.

Q. Pretty well up in the eyes of her?

A. Yes, sir.

Q. And looking in what direction?

A. Both directions.

Q. You were alone there?

A. Yes, sir.

Q. There was no other lookout on watch with you?

A. No, sir.

Q. The night was so dark that at a short distance from your boat you could not see other boats?

A. Well, I could see a black outline or an object.

Q. You could see the outline of her and an object that looked like a black substance?

A. Yes, sir.

Q. Did you report any lights to the captain before you reached the piles about the middle of the river?

A. I cannot say exactly now. I reported whistles from steamboats; I cannot say that I reported any lights. I reported whistles from the slip down there.

Q. You reported whistles from the ferry-boats?

A. Yes, sir.

Q. Did they blow to you?

A. I think so. I think they blowed as we were coming down the river.

Q. Do you recollect now that any of the ferry-boats blew to the Conemaugh?

A. I cannot say they were ferry-boats, but they were steamboat whistles.

Q. You don't know where they came from?

A. No, sir.

Q. Or what they were?

A. No, sir.

Q. If you heard a blast of the deck whistle of the steamer, what did you do?

A. Reported to the captain.

Q. In what way?

A. By telling him how many blasts.

Q. You would say to the captain: One blast of the whistle?

A. Yes, sir.

Q. Did you tell him where it was?

A. Yes, sir. If it was any way thick, tell him the direction it appeared from.

Q. To the best of your ability, then, you would indicate by the number of points on either bow where the vessel came from?

A. Yes, sir.

Q. Did you report the lights of the ferry-boats?

A. Well, if we were any way near them; if they don't happen to blow the whistles we report them—in case of necessity.

60 Q. Did you report any?

A. I cannot say I did.

Q. You haven't any recollection of reporting any lights?

A. No, sir.

Q. Did you report any light to the captain from any other vessel that night before you reached the piles where the Kasota was sunk?

A. No, sir, I don't think I did.

Q. You know what part of the river those piles were in?

A. Yes, sir.

Q. Where?

A. Just above Smith's coal dock.

Q. A little above it?

A. Yes, sir.

Q. And about the middle of the river?

A. Well, I cannot say they were in the middle of the river.

Q. Did you ever see them in the daytime?

A. I cannot recollect of seeing them in the daytime.

Q. What did you see of them at night?

A. Lights.

Q. How were they lighted?

A. By lights stationed on top of the piles.

Q. How many piles were there?

A. That I cannot say. I never counted them.

Q. What kind of lights were they?

A. White lights.

Q. Did you ever report those lights?

A. Yes, sir.

Q. Did you report them that night?

A. I reported that just as quick, or a little before we had that tow ahead of us, and the captain was looking at the tow. He was heading for Smith's coal dock.

Q. You saw this light on the piles and reported it to the captain of your boat?

A. Yes, sir.

Q. At that time the captain was heading about to the coal dock?

A. Yes, sir.

Q. Was that about the time she blew one whistle to the vessel on your port hand?

A. I don't know which vessel that was. I don't know as I heard the captain blow one whistle at all.

Q. Didn't you hear him blow one blast about the time you reached that light?

A. I cannot say I did.

61 Q. Can you say you did not?

A. Well, I didn't; I have no recollection of it.

Q. You came up on that light passing it to starboard?

A. Passed that light to port.

Q. You passed that light to port?

A. That light was on our port hand; the Kasota piles, I mean.

Q. When the Conemaugh came up to that light, how far from it did she pass it?

A. Oh, I should say it was one of our boat-lengths from it.

Q. How far is that in feet?

A. I cannot say.

Q. Don't you know the length of the Conemaugh?

A. I should say she was 250 feet.

Q. You think you were 250 feet from that light when you passed it?

A. Yes, sir.

Q. Just before you lapped it with your bow, you were standing on the port bow of the Conemaugh?

A. I was standing more to port than starboard.

Q. Just at that time didn't the Conemaugh blow one whistle, deck whistle I mean?

A. No; I never heard one.

Q. At that time when you passed that light, had you seen the Burlington and her barges?

A. No, sir; I hadn't seen the Burlington at all, but I was just going to report it to the captain when he blew two blasts.

Q. At that time you hadn't seen her at all?

A. No, sir.

Q. What was the first indication that you got that the Burlington and her barges were in the river below you?

A. Well, I seen her green light show up as she was rounding the dock.

Q. How did it bear to you?

A. Bore up the river, I could see the full green light.

Q. How did that green light bear from you?

A. She was bearing up the river.

Q. You don't mean that. She was not above you in the river.

A. No; she was below us, but it was shining up the stream.

Q. But how did it bear from you? What was its bearing from you?

A. I should say it would be about two or two and a half points on our starboard bow.

62 Q. About two or two and a half points on your starboard bow?

A. Yes, sir.

Q. Had the Conemaugh blown two whistles then?

A. Yes, sir; she blew two whistles just as I was going to report the lights.

Q. Then whoever had control of the whistles apparently saw the lights about the same time that you did?

A. Yes, sir.

Q. At that time you saw the masthead lights of the Burlington, how many did she have?

A. Two.

Q. And her starboard light?

A. Yes, sir.

Q. And what other lights?

A. I didn't see any other lights aboard of her. I saw the green light of the tow behind her.

Q. Is that the only light you saw?

A. Yes, sir.

Q. What did you see astern of that barge?

A. A few minutes after I made out some black objects on the water,

and I saw some lights; I supposed they were binnacle lights from the other barges in the tow stretched across the river.

Q. You supposed they were binnacle lights?

A. I supposed so.

Q. Why did you suppose they were binnacle lights?

A. I didn't see as they would have any other lights there.

Q. Did you ever see a tow barge carry binnacle lights?

A. I supposed they would have one.

Q. Did you ever see one on those barges?

A. I have never been aboard of one yet.

Q. It would be a strange binnacle light that you could see off on the water that far?

A. Sometimes you catch a flicker of a small light.

Q. Do you think it was a flicker of a white light that you saw?

A. Yes, sir.

Q. Then with the exception of the Burlington's masthead light and starboard light, and the starboard light of the barge, you saw merely flickering flashes of a white light?

A. That is all.

Q. But you could see the dark object on the water?

A. Yes, sir; certainly.

Q. Could you see the second, third, and fourth barges?

A. We could not count them. I saw some black objects,
63 and tried to make them out; tried to count them.

Q. When you blew that blast of two whistles, what did it answer if anything that you heard?

A. Two blasts of the Burlington.

Q. Did the Burlington blow you two blasts?

A. Yes, sir.

Q. Did you hear the Burlington blow one blast about that time?

A. No, sir.

Q. Did you hear any other boat blow to the Burlington one blast about that time?

A. No, sir.

Q. When finally, or about the same time you blew the two whistles, did you hear the order starboard given on your boat?

A. Yes, sir.

Q. How was it given?

A. Given to the whistles.

Q. How was it given?

A. The captain said, Starboard your wheel.

Q. Didn't he say, hard-a-starboard?

A. Yes, sir.

Q. How quickly did the boat obey that?

A. She answered around very quick.

Q. How quickly did she obey it on that occasion?

A. She came around very quick.

Q. And she was running then about how fast?

A. Well, I cannot say. I cannot exactly say the speed a boat is running.

Q. Don't you know the speed of that boat?

A. Ten or 11 miles an hour.

Q. And she was running ten or 11 miles an hour when that order was given?

A. Yes, sir.

Q. She swung around very quickly under it?

A. Yes, sir.

Q. Did you notice how far she turned under it?

A. Under where?

Q. Under that starboard, or hard-a-starboard order.

A. She turned so she was heading upstream a little bit.

Q. Turned around more than eight points?

A. I should think so.

Q. Consider that piece of paper, that chart as representing the Detroit river between the channel banks. I want you to place this vessel which we will call the Conemaugh, and the Burlington and the four barges as they were when you heard that order hard-a-starboard.

64 Witness places models.

Q. And you may place the Conemaugh when you blew two whistles to her, and got the order hard-a-starboard.

Witness places models.

Q. Do you think the stern barge of the tow bore off in that way from your bow?

A. I could not exactly say the way they were. I cannot place the barges in their exact position.

Q. Did you see those barges before your vessel turned under the starboard helm?

A. I saw some dark objects.

Q. Where were those dark objects from where you stood?

A. They were over here on the port bow.

Q. Now the order hard-a-starboard was given and swing your boat around as far as you think she went.

A. (Moving models.) She would be coming downstream a little.

Q. Well, if she flopped around like that she would have thrown you overboard.

A. Well, she came around like this.

Q. Do you think she headed upstream as much as that?

A. Yes, sir.

Q. Headed about two points straight across the river?

A. Yes, sir.

Q. Take her right there now; what next was done on her?

A. The order was given to steady then. She dropped a little when we steadied.

Q. Put her where you dropped.

A. When the order was given to steady, then the order came to follow the tow along.

Q. What did she do?

A. She came around here.

Q. The order to follow the tow around was given before you reached the stern barge in tow?

A. Yes, sir.

Q. Up to that time your speed had continued, you said?

A. We checked then.

Q. When did you check?

A. After we passed the Kasota's piles.

Q. You didn't check but once?

A. Only once.

Q. And you told us this morning you checked when you were astern of the stern barge in the tow? That was the checking you referred to, wasn't it?

65 A. We checked after we got the second signal. We checked when we got the second signal of the boat going up.

Q. That is the time you checked?

A. Yes, sir.

Q. Are you sure of that?

A. That captain at the same time gave the order to starboard coming around here; give two blasts of the whistle and checked at the same time.

Q. That was the second blast of two whistles that you had blown?

A. The first blast.

Q. Do you know which it was? Can you state definitely what did take place there? You have given it to us in two or three different directions; I want to know which the right one is. Consider what you are going to say before you answer the question and give it to us definitely the way you are willing to swear.

A. When we came around the Kasota's piles, the order was given to starboard, and when the wheel was put starboard and she was coming around, the captain then checked the engine and gave two blasts of the whistle just after one another to this steamboat coming up the river, which proved afterwards to be the New York.

Q. What steamboat coming up the river did he blow two whistles to?

A. The New York.

Q. Where was she?

A. She was coming up the river headed towards the third barge in the tow. I could see her green light.

Q. Third from which end?

A. Up here. She was coming from the American side.

Q. How do you know she was?

A. Well, it seemed so.

Q. How did it seem so? Describe what you saw, please.

A. When I first saw her it was just as the captain gave two blasts of the whistle to him. Just before that I was looking towards the tow trying to make the tow out, and I looked up when he gave three blasts of the whistle, and that was the first I saw of the New York, or the steam vessel coming up, with both colored lights and masthead lights, so I knew she was coming straight up the river.

Q. But you have just said she was heading across the river or part ways across?

A. Afterwards, then she shut out her red light.

66 Q. Then she shut out her red light and stood on, did she?

A. Yes, sir.

Q. Now, just think what you have testified to and see if you are right about that?

A. I am right as far as I saw it.

Q. And you know what you are talking about, do you?

A. Yes, sir.

Q. Which way did she stand when her red light went out?

A. I suppose she was standing up the river.

Q. Did she seem to you to change her course in any way?

A. She must have changed her course when she shut out the red light.

Q. That is not evidence of anything that she must have done.

Q. What did you see her do any more than to shut out her red light?

A. The next time I saw it was when she hit us. The next time she shut out her red light was after she changed her course when she passed the last barge, then she opened her red light in full to us and shut out her green.

Q. Is that when she hit you?

A. No, that was when she was coming up the river. We had a green light in full, and then the next time I saw her light it was red. She shaped her course off towards the Canadian shore.

Q. She was coming up the river showing her green light and masthead light?

A. Showing both lights, yes, sir.

Q. Then you watched her, didn't you?

A. Yes, sir, and her red light went out.

Q. And you watched the green light and the masthead light a little while?

A. Yes, sir.

Q. You could see the boat itself?

A. No, sir.

Q. You watched that a little while, and where did the light open to you again?

A. Yes, sir.

Q. And the green light went out?

A. Yes, sir.

Q. About how long an interval between the opening of the red and the going out of the green at that time?

A. It wasn't long.

Q. She seemed to be swinging around pretty lively, did she?

67 A. Pretty quick.

Q. And she shut out her green entirely and showed you a bright red light?

A. Yes, sir.

Q. And that continued until she had arrived at what part of the tow?

A. Well, I should say it was the tail end of the tow, after she passed the tow altogether.

Q. After she passed altogether?

A. Yes, sir.

Q. When the Conemaugh came by the stern of the rear barge and the New York came by the stern of the barge, she was showing you her red light alone?

A. Yes, sir.

Q. You could see her then?

A. I could see the back of her.

Q. And the barges were out of your way?

A. Yes, sir, they were dropping down all the time, and we were dropping down the same time too.

Q. After you passed the rear of the stern barge and had open water all around your starboard bow, the only thing in the way was the New York, and she was showing you her masthead light and red light?

A. Yes, sir.

Q. And she seemed to starboard and run into you?

A. Yes, sir.

Q. Now, Mr. Priest, are you satisfied with that statement as correct?

A. Yes, sir.

Q. Have you given it proper consideration so that you know you are right about it?

A. As far as I can say about the lights. I give it to you as correct as I can.

Q. Where was the Conemaugh when that last blast of two whistles was blown?

A. She was about abreast of the last barge of the tow.

Q. That is when she gave the two last whistles?

A. Yes, sir.

Q. Where was the New York then?

A. New York was heading for the third barge, about so.

Q. Showing you her red light?

A. Yes, sir.

Q. And masthead light?

A. Yes, sir.

Q. Could you see her hull?

A. I could see the black outline of her, that is all.

Q. Did you look up to see that your lights were all right?

68 A. Yes, sir.

Q. And you found them all right?

A. Yes, sir.

Q. Burning bright?

A. Yes, sir.

Q. When was the alarin signal blown?

A. Just after the last two blasts of the whistle.

Q. Did they follow pretty closely?

A. Pretty close together.

Q. And almost instantly after the alarm signal was blown the New York opened up her green light and ran into you?

A. No, sir, as soon as the alarm signal was given she showed her red lights in full, then she must have shaped her course out here afterwards (referring to models).

Q. Didn't you state you saw nothing but her red light down there when the two signals were blown?

A. Only her red light and masthead light.

Q. Could she show you any more on that side than that red light?

A. No.

Q. And you saw that before the two whistles were blown?

A. Yes, sir.

Q. When the two whistles were — what change of lights did she make?

A. The only change was that we saw both the lights when she struck us.

Q. She came up continuing to show you that red light until you reached up astern, or until this barge got down by her when she showed both lights?

A. Yes, sir, and struck us at the same time she showed us the both lights.

Q. When she was showing you the red light you think the relative bearing of the boat was about that way? (Placing models.) Your boat was running ahead?

A. Very slowly.

Q. And ran across her course, did it, before you two came together?

A. Yes, sir.

Q. Did she seem to be going around pretty lively?

A. Yes, sir.

Q. Could you see anything on the shore at the time of the collision?

A. No, sir, could see black outlines of the trees, no lights or anything.

Q. What order to the wheelsman did you hear after the last blast of two whistles?

69 A. Hard-a-starboard.

Q. When was that given?

A. After we blew two whistles; after we blew the last two whistles.

Q. How, with reference to the alarm whistle, before or after that was blown?

A. After the alarm was blown.

Q. Did you stand on the deck all the time until the collision took place?

A. I stood there all the time until she hit us.

Q. What did you do when she hit you?

A. Waited until I was told to go away.

Q. Did you know when she took the bottom?

A. Yes, sir, she took to bottom just after we were struck.

Q. About the same time?

A. About a minute or so.

Q. Pretty near the bank when you struck?

A. Yes, sir, as far as I can judge.

Q. As it seemed to you the boat was pretty near the bank when they came together?

A. Yes, sir.

Q. And the Conemaugh's nose ran in the bank very soon after she was struck?

A. Yes, sir.

DAVID STEVENSON, after being duly sworn on behalf of libellant, testified as follows:

Examined by Mr. GOULDER:

Q. On the occasion of the collision between the New York and the Conemaugh, what was your position on the Conemaugh?

A. Porter.

Q. As porter what had you to do with the signal lights?

A. I had to take care of them.

Q. Did you take care of them that day before they were put out, the last time before this collision?

A. Yes, sir.

Q. Did you put them out in their places yourself?

A. Yes, sir.

Q. How were they as to being trimmed, filled, and as to the manner in which they were burning when you put them out?

A. The same as usual.

Q. And the same as usual was what kind of condition?

A. First class.

70 Q. What kind of lamps were they?

A. They were good lights.

Q. Large or small?

A. Large.

Q. Of the kind used ordinarily for that purpose?

A. Yes, sir.

Q. Were you on watch, that is upon deck, at the time of this collision?

A. A few minutes before it happened.

Q. Do you know anything about how they were then?

A. I didn't look at them before this. I had no occasion.

Q. After the collision did you see those lights?

A. Yes, sir.

Q. Did you bring them in?

A. Yes, sir, I took them in.

Q. How long after the collision?

A. About ten minutes.

Q. I will ask you now to describe the condition of the green and red lights as they were in their places when you took them in, whether they were burning, and if so, how?

A. The red and green light was burning brightly, the headlight was out.

Q. What condition were they in when you took them in?

A. First class.

Q. You saw the masthead light?

A. It was out.

Q. In what condition was the lamp and chimney?

A. If I remember rightly the chimney was out the lamp had been jarred off, I presume.

No cross-examination.

STEWARD M. POWRIE, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. You were master of the Burlington at the time of the New York and Conemaugh collision, were you?

A. Yes, sir.

Q. Do you remember rounding to at Smith's coal dock that evening?

A. Yes, sir.

Q. At that time and for a little time before, who was on deck and in charge of your vessel?

71 A. I was myself.

Q. When you proceeded down the river and before you rounded to, I wish you would describe on which side of the river you were, as well as you can now recollect, and the distance you were out from the shore?

A. We followed down the Canadian side just fairly close, nothing closer than common, our usual run.

Q. About what proportion of the river did you have on your port hand, on the Canadian, when you started round to, should you say?

A. I should call it fully a quarter of the river, to the best of my judgment, that was the way it was.

Q. You rounded to on what helm?

A. Port helm.

Q. You had in tow what barges, and place them in the order they were?

A. The Wesley, the Republic next, the Amaranth, and the last was the Ferguson.

Q. What was the length of the Burlington, about, over all?

A. She was in the neighborhood of 145 feet. She is an old-fashioned canal steamboat.

Q. What was the length of the four barges?

A. The Wesley is about 150 feet long; the Republic and Amaranth will run probably 148, and the Ferguson 134 or 135.

Q. And about the average length of the tow-lines?

A. Well, the Wesley's tow-line was about 600 feet; the others would vary, between four or five and three. The Republic line

was, I guess, a little the shortest. The average between those lines was about four or five hundred feet. Of course, that is an estimate; I didn't measure them.

Q. When did you first see the New York, the upward-bound boat?

A. Just after I had ported to round to and after I had started rounding. I saw the lights down below.

Q. Did you exchange any signals with her, if so, what?

A. As soon as I saw her lights and knowing it to be a steamer, I blew one whistle and she replied to it promptly.

Q. With what?

A. One whistle.

Q. At that time how far, in your judgment, was she down the river from you, and in what part of the river?

A. I thought, and I do yet, that she was well over towards the American shore, and certainly not less than a mile or a mile
72 and a half, pretty well down the river, still not so far but what I saw the lights all right.

Q. And heard the whistles?

A. Yes, sir.

Q. As you came around, where were you with reference to the lower end of the coal dock?

A. Well, the part of the dock that we coal at was just above of where the dockman's house is, and I always make it a point to round when squarely abreast of there. The drift would take us down about right, so I could say we were just about abreast of the lower end of the dock.

Q. That wasn't at the extreme lower end—or would be the extreme lower end of the dock, would it?

A. Well, not quite. It would be pretty hard to judge exactly in the night and across the river.

Q. Now, at what point in this manœuvre had you arrived when you did something with reference to the Conemaugh?

A. I saw nothing of the Conemaugh until after I had rounded and my boat was pointed nearly upstream, and I think my first barge was pointing nearly up, and then I saw the steamer coming down and I blew him two whistles and he answered immediately.

Q. Answered with what?

A. Two whistles.

Q. What did she then do?

A. Put her wheel to starboard and shot across the river. I thought he was going to turn around up the river.

Q. You say you heard her give two blasts. Did you hear another signal of any kind aboard of her at the time she answered you with two?

A. I don't believe I shall answer that yes, although I am positive I heard a signal.

Q. What signal?

A. To check down. At any rate I noticed she did check down right straight away, and as I was very much interested in the boat,

as I thought she was going through the middle of our tow, if she didn't do something.

Q. And you closely observed her movements at that time?

A. Yes, sir.

Q. Are you positive you heard an engine signal?

A. No, sir.

Q. What is your recollection about it?

A. My best recollection now is, that I noticed first the checking of the boat down; that is, the hull of the boat.

73 Q. To what extent did she apparently turn there in the beginning with reference to athwartships of the river as it appeared to you?

A. I thought she turned right square athwartships of the river. It looked so to me.

Q. Then where did she go?

A. Over towards the Canadian shore.

Q. Did you see the collision?

A. Yes, sir, at the time they came together I saw the boats. Just the moment before they struck. I had been dropping towards the dock all this time, and some of the men sung out: They are going to strike, and I looked over and saw the two boats come together.

Q. Where did they come together with reference to the Canadian shore, as it appeared to you from your position?

A. They looked as though they were over on the Canadian bank, close to it.

Q. At that time, I wish you would give to the court the best information you can as to the distance from your tow, or any part of it, the nearest part of it to the Canadian shore at the time of this collision. Take either barge, whichever it was, and give us the best judgment you can, taking into account where you started from, the manner of rounding to, and the apparent distance, as you looked across there.

A. I should say my stern barge must have been fully one-third the distance from the Canadian shore.

Q. That is the best information you can give on that subject?

A. Yes, sir, because I was pulling on them all the while, and must have pulled them over a little bit. I was pulling on them enough to overcome the tendency to go the other way, sure.

Q. What light, if any, did you see on the Conemaugh at any time between her swinging athwartships above you and the collision?

A. After she had starboarded her helm and gone across the river?

Q. Yes, sir; after that time, and any time between that and the collision, did you observe any lights aboard the Conemaugh, and if so, what were they?

A. Not especially. She was bright light up in her house, especially aft.

Q. Did you see any lights on her?

A. I cannot say that I did; that is, signal lights.

Q. You can't remember that you noticed any?

74 A. Not particularly, no, sir; I don't think now that I noticed her green or head light. I noticed them when she blew her signal and when she swung to starboard.

Q. How did they appear?

A. My recollection is her port light was the little best, the little brightest.

Q. My question relates to the character of the lights, whether they were good, bad or indifferent?

A. They were bright at that time, no mistake about that.

Q. As she was coming over there, did you hear her blow any signal with her big whistle?

A. Yes, sir, three blasts several times.

Q. How many times did you hear her blow two blasts?

A. Certainly twice, and then a series of whistles. I didn't pay any attention to them; I didn't have time.

Q. What do you call a series of whistles?

A. Short toots that might have been taken for three or four starboard whistles, and it might have been an alarm whistle. I didn't notice that.

Q. You stated when you saw her below she seemed to you to be well on the American side, about a mile or a mile and a half below you. Did you notice by her lights or otherwise any alteration in her course as she came up?

A. I noticed immediately after I blew her a whistle and she answered it, or very shortly afterwards, that she ported in answer to my whistle, but about how much I didn't pay much attention to.

Q. How far down should you say the New York was when you noticed that porting, in your judgment?

A. I would not want to say. The boat was coming up the river and he answered my whistle very promptly, but according to my recollection, he must have been down the river three-quarters of a mile.

Q. Below you?

A. Yes, sir, that is guesswork.

Q. That is an estimate?

A. Yes, sir; one thing I noticed he didn't sheer off square across the river; he ported to get out of the way of my boat.

Q. At that time you were showing your masthead light?

A. Yes, sir.

Q. And were heading partly down the river?

A. Yes, sir, at the time he answered my whistle.

Q. What lights should he have seen?

A. He should have seen our red light and headlight. Our lights were burning brightly.

Q. And during the time of the approach of these vessels, as I understand you, you were rounding the dock?

75 A. Yes, sir.

Q. Now, have you any impression or any recollection about the speed of either of those boats?

A. The Conemaugh, or the New York, do you mean;

Q. Yes, sir, you have told us about the Conemaugh; what about the New York? How fast was she coming up?

A. Well, I could not tell you. She was coming pretty lively.

Q. Beyond that you cannot speak?

A. No, sir.

Cross-examination.

By Mr. WISNER:

Q. How long did you sail the Burlington?

A. Only last season.

Q. What was her speed down the river with those barges in tow?

A. Why, we figure in making six miles an hour in dead water, outside.

Q. And you got six miles and the current down the river?

A. Yes, sir, I should think that was probably, when she was going right along, that was about her gait.

Q. On what part of the river, if you had been bound through without stopping, would you have been in with your tow when you got to a point when you did round to, if your intention had been not to stop?

A. It would be guesswork for me there. We generally started with our tow pretty close aboard the Canadian side, up by the beach there at Brighton house and take a straight line as near as we can to Fighting island or midway between Fighting island and the American shore. I should think we would be a little towards the Canadian side of the center of the river, going straight through there at the coal dock.

Q. That is the usual place for steamers to run in that locality, isn't it?

A. I don't know. That is about the way I usually run.

Q. Up-bound boats are a little nearer the Canadian shore and the down-bound boats are a little nearer the middle of the river?

A. Yes, sir, but not necessarily so.

Q. Did the New York when you saw her appear to be out of the usual track of vessels coming up?

A. No, sir, not when I first saw her. She was right square in the track.

76 Q. Do you now recollect whether you blew her first or she blew you first?

A. I think I blew her the first whistle.

Q. You were showing her your port side and masthead lights?

A. That is what she must have seen, because I had started to round to. I think we had rounded enough so we hid the green light, but perhaps we didn't.

Q. Had you received any whistle from up the river at that time?

A. No, sir.

Q. Did you hear any?

A. No, sir.

Q. Had you seen anything coming down from above you at that time?

A. No, sir; the first I saw of the downward-bound boat was when I saw the Conemaugh's lights——

Q. You didn't see anything on that stretch across the river that might interfere with it?

A. I didn't see any.

Q. Then you didn't see the Conemaugh's lights?

A. No, sir, not until I had rounded up the river.

Q. You didn't see the Conemaugh's lights until the Burlington was rounded and headed pretty well upstream?

A. Yes, sir.

Q. Did you get alongside of the dock ultimately?

A. Yes, sir, I was stopping there for coal.

Q. How near to the dock were you when you blew to the Conemaugh?

A. I should think 400 feet, or 300 feet, or possibly 500 feet.

Q. Below it?

A. No, sir, coming up alongside of it, that is from the side of the dock.

Q. About abreast of it with you?

A. At the time I blew to her I must have been about abreast of our own coal dock just above where the house stands.

Q. And you were depending upon the current to set you over to it—more than your headway?

A. Perhaps I was a little above there.

Q. You were either abreast or above it?

A. Oh, no, I was not above the dock at all.

Q. What did you refer to when you said above?

A. About two or three hundred feet from the lower point, the bend, above the house.

77 Q. And you were depending on the current to set you over against the dock?

A. Yes, sir.

Q. There is no mistake about that, is there?

A. No mistake only in this way: I was not depending on the current because I had a steamboat with a wheel in her, and I could put her anywhere I wanted to, but this was in the night and in fetching up close to the dock I was anywhere from 300 to 500 feet from it and, of course, I was going slow at that time, to let my barges drift around.

Q. Now, I will ask you that question, since you have gone into it, because you stated a moment ago with reference to your stern barges that they must have been pretty well down because you were standing pulling on them, and I want to stop at some place on the river, where you stopped pulling on them, and you had stopped when you blew the Conemaugh?

Q. No, sir, I was not. I saw them out from the docks a little while the stern barges were going around the river.

Q. You were not going further upstream, were you?

A. Yes, sir, I think we were moving up a little, possibly we were just about holding our own.

Q. What you mean by pulling on to them was that you were holding on to them?

A. Yes, sir.

Q. You were not drifting down?

A. I don't think so. The engine was working anyway.

Q. You don't mean to say that the Burlington was steaming up above the dock where you were going to get your coal?

A. No, sir.

Q. What other lights than the side and masthead lights did the Burlington show? Did you have a steering light?

A. We had a steering light and stern lights, and whatever lights there may have been around the cabin. She had two lights astern.

Q. Flagstaff light?

A. Yes, sir, and one under the promenade deck hung up.

Q. One was your regular range light and the other your steering light?

A. Yes, sir.

Q. What light did the Wesley show?

A. She had two good colored lights forward, for I recollect seeing them. What she had aft I don't know.

78 Q. Do you know whether any other barges carried stern lights?

A. They all did.

Q. Could you see them from your steamer?

A. I could if I paid special attention.

Q. How were they put up?

A. In various ways. I think the Wesley had got a staff with a box nailed on it three-quarters of the way up.

Q. You would not see any of those stern lights of the barges?

A. No, sir, I don't think I did.

Q. Were they not all boxed in?

A. I don't know whether they were all or not. I think the Wesley's was; I never paid any attention to them.

Q. When you saw the side lights and the headlights of the Cone-maugh, where in the river did you place her?

A. She must have been in the neighborhood of the Kasota's piles.

Q. Near the American shore, or out in the river?

A. Oh, she was out in the river some.

Q. Did she seem to be out in the usual place, out near the middle of the river?

A. Yes, I should not think she was more than 200 feet or 300 feet to the westward of the piles anyway, and possibly not half that. I don't know about that.

Q. As soon as you saw her you blew her two whistles?

A. Yes, sir.

Q. Did she answer you promptly?

A. Yes, immediately.

Q. What was the condition of the atmosphere at that time?

A. I think it was starlight overhead, a clear dark night. The

moon hadn't come up. There was a little smoke up around town, quite a little.

Q. Good deal of smoke in the river?

A. There was some, not a great deal.

Q. Up and down the river?

A. Not so but what you could navigate. I don't think it could have been very smoky down below, before I rounded to.

Q. Did you pass a steamer just before you got to the place to round to? Do you recollect passing a steamer that was rolling out thick black smoke from her smokestack just before you got to the place where you intended to round to?

A. I don't recollect. We may have passed steamers, but I don't remember of it.

Q. When she answered your two blasts, how was she in the river, with reference to your stern barges?

A. The Conemaugh?

Q. The Conemaugh.

A. Well, I can't tell that. My stern barge must have been, and were both of them pointing down the river.

Q. Two of them were pointing down the river, and the other one?

A. Was just straightened from it. The second barge I think was square athwartships of the river, or nearly so, but the two stern barges must have been looking down the river pretty well. Just how far the Conemaugh was from them I don't pretend to say.

Q. The stern barge was a little more than half a mile from you?

A. Somewhere around there. She could not have been half a mile either, as the river ain't a half mile wide.

Q. She was not anywhere near the Canadian bank, and was not close to the dock?

A. Yes, sir.

Q. It would be half a mile if you were to follow your tow-line around?

A. Yes, sir.

Q. You stated in your direct examination that you watched the Conemaugh very closely when you signaled her two whistles?

A. Yes, sir; I did.

Q. It was dark. You could not see anything of her lights, could you?

A. No; I could make out she was a steamer.

Q. Of course, the masthead and side lights would indicate that to you?

A. Yes, sir.

Q. You could not see the body of the boat swing in the water, could you?

A. Oh, yes; we could see the boat's hull plain enough to know it was a boat all right. We could not distinguish a man walking on the deck, or what color she was painted; and putting her wheel hard-a-starboard as I judge she did, she came around there mighty lively by the shape of her colored lights.

Q. You told that by the lights?

A. Well, not exactly. By the lights and the boat too.

Q. It was light enough so you could see the boat turn around?

A. Yes, sir.

Q. And she turned around lively, you say, so lively—

80 A. Yes, sir; and so far around that I thought she was going to back up the river, and I think I mentioned to some of our boys: That fellow ain't going to get into any trouble, he is going up the river.

Q. You thought she was going up the river because she turned around so far?

A. Yes, sir.

Q. Shut out all the lights she had?

A. Yes, sir.

Q. You thought she was going up the river, and you expressed that thought to some of your boys?

A. Yes, sir.

Q. And you also said, "I thought she was going through our tow if she didn't do something"?

A. Yes, sir.

Q. Won't you explain the two ideas more clearly? If you thought she was going up the river; turned around so much; indicated that to you, why did you think she was going through the tow?

A. You haven't got my thoughts in the right shape.

Q. I have it as you gave it, and in the order you gave it.

A. If he hadn't starboarded and got out of the way, if he had kept on going down the river, he certainly would have gone through the middle of our tow, but he starboarded and got out of the way.

Q. And is that all the explanation you can give? Or was it based on the idea you thought your barges were pretty well up there, so that in rounding he might strike one of them?

A. Oh, no, he had lots of room for that.

Q. Your language was "I thought she was going through our tow if she didn't do something"?

A. Yes, sir; that is right.

Q. You had just before that stated that she turned around so under a starboard helm that I thought she was going back up the river. Now, do you desire to explain the apparent inconsistency of those two statements.

A. I don't see where the inconsistency comes in.

Q. Very well, I won't ask you anything about it then. I will talk about it later. It was so light you could see the athwartships of the stream, standing off the Canadian shore?

A. Yes, sir.

Q. You didn't hear her checking whistle, but you saw her check?

A. Well, I believe I stated that I would not take my oath that I heard the whistle, still I felt pretty certain I had heard it. At any rate, I saw the boat slack her speed.

81 Q. What did you see that led you to believe she was checked?

A. I saw the boat go slower.

Q. You noticed a difference in her speed?

A. I certainly did, no mistake about that.

Q. When did you first notice that difference in her speed with reference to the swinging out of sight of her lights?

A. Well, that I could not perhaps tell you exactly. It was after her lights were out of sight anyway.

Q. You noticed a change in her speed?

A. Yes, sir. I don't know but it might have been after she started to go down the river; started to come around pretty well again.

Q. You hadn't said anything about that?

A. Well, I am saying it now.

Q. I have not asked you about that. You have mixed me up a little. I want to know what you saw that indicated to you that the boat had slacked up its speed that night after the boats were out of your sight.

A. You want to know what I saw that made me think the boat slacked her speed?

Q. Yes, sir.

A. I have already said I saw the hull of the boat, not to distinguish anything aboard of her, but enough to tell it was a boat's hull, and she was going down the river pretty lively, so lively I thought she had made the turn over towards Canada.

Q. How long have you sailed, Captain, as master of steamers?

A. Four seasons.

Q. It is generally understood aboard your steamers that when you ring a checking bell and your engineer checks the engine to about half speed?

A. Well, I believe engineers and captains of boats vary as regard to that.

Q. Isn't that understood on your boat?

A. Ordinarily. On about running alone I suppose that would be about right.

Q. You know the size of the Conemaugh?

A. She is 1,400 or 1,500 ton boat, I guess.

Q. Have you sailed such a boat?

A. I have sailed on boats of that size, but never master of one of them.

Q. With the Burlington, have you sailed her without a tow?

A. A little.

Q. Then you know how she handles with a tow?

82 A. Yes, sir.

Q. Her full speed is about seven miles an hour?

A. Without a tow?

Q. Yes, sir.

A. Oh, no.

Q. What is it?

A. The engineer claims he can get 14 miles an hour out of her, but I would reduce that. I should call it about 12.

Q. Did she run that when you sailed her without a tow?

A. She had at various times.

Q. Did you get 11 miles an hour out of her?

A. Oh, yes.

Q. Running down through clear water at a speed of 11 miles an hour, you give the order to check and it is obeyed at once, how long do you think it would be before the Burlington had settled down to half speed under that check?

Mr. GOULDER: I object. I would like the court to make a ruling as to whether the counsel makes the witness his own by going into this line of inquiry.

COURT: I think this is proper cross-examination.

Q. How long after that check was given before the boat settled down to her half speed?

A. Well, sir, I could not tell you.

Q. How far would she run before she settled down to half speed?

A. That I could not tell you.

Q. Can't tell in any way?

A. Oh, it would be the merest guesswork in the world to tell how far she would run before she would settle down to half speed. I don't think she would run but a short distance before you would notice a lessening of the speed, but whether it would be six or seven miles an hour I could not tell you.

Q. How soon would you notice the slacking of the speed?

A. I have an idea that a boat running 12 miles an hour, especially a big boat, you would notice it almost immediately.

Q. And you think when half a mile away in a dark night you would notice it immediately when the lights are all out?

A. What do you mean by immediately?

Q. Whatever you mean by immediately.

A. Yes; well, I didn't mean that she would stop her speed in a minute or two minutes or perhaps three minutes; I have no method of telling you the time, only this: That when the boat starboarded, started across the river, that the next time I saw her I noticed she had materially stopped her speed. Now, I was tending to my own boat, I had my own hands pretty full, and I was not looking all the while at the Conemaugh, but I saw her before she got anywhere near the New York, and I noticed she had materially stopped her speed. My impression of it is that I heard her giving checking bells, but I am not positive of that.

Q. You don't testify to that?

A. No, sir, I don't.

Q. But you do testify you saw her slack her speed?

A. Yes, sir.

Q. Is it not a fact that you mean to say this: You noticed when you blew to her she was going along at a good rate of speed—

A. Well, she seemed to be coming down the river pretty lively.

Q. She was rolling up the water?

A. I didn't notice that.

Q. You could see it?

A. I think I could have seen it as it would be white, but I don't recollect of paying any attention to it. If she was throwing up much of a bone I think I would have noticed it.

Q. And she answered your signal of two blasts, swung her light out of your sight; you were occupied in getting up to your coal dock with your steamboat and looking out for your barges; after while you glanced over to the Conemaugh and you noticed that her speed seemed to be slower than it was when you first saw her.

A. Yes, sir, I am positive of that.

Q. And you don't mean to testify to anything more?

A. No, sir, I don't want to testify to anything I didn't see.

Q. We will leave the Conemaugh with her checked speed, running apparently for the Canadian shore, as I understand you put her, clear of your barges?

A. Clear of the barges. You mean pointing up towards the barges?

Q. Yes, sir.

A. Yes, sir, I think she was.

Q. You didn't notice that particularly?

A. Yes, I did. I am pretty sure she was clear of the barges.

Q. From where you were could you see the barges plainly?

84

A. Not very plainly.

Q. You could see the Conemaugh plainly.

A. Not plainly, no, sir, it was a boat and what she was doing, that together with my knowledge of the whistles, and I saw the man put his wheel starboard, and it made me know then what she was about.

Q. With what did you relate the Conemaugh as she was coming across there so that you could tell whether she was standing stock still in the water, or running at the rate of 12 miles an hour after her lights were shut out?

A. You mean what other lights was around her so I could tell as regards her speed?

Q. What did you relate her to?

A. There were several things I might have noticed at the time and taken as a basis to figure their speed from, but I don't know whether I did or not.

Q. Unless you could relate her to something you could not tell anything about her, could you?

A. There were more or less lights on the Canada side; the lights on the Kasota piles I think were there. There wasn't any trouble about getting something to locate her by.

Q. Did you see the Kasota's piles?

A. I don't know as I did. I don't know as I noticed anything specially for that purpose. The lights of the piles would be the most definite thing to notice for that purpose, because they were nearest.

Q. You didn't relate the piles with her?

A. I don't know as I did.

Q. You didn't look from the piles across to the Conemaugh and back to see what was the difference?

A. No, sir, I don't know as I did.

Q. You cannot give us any reasonable explanation of how you reached your conclusion?

Objected to.

Q. Well, any explanation. I will throw off the word reasonable. How did you reach the conclusion that boat changed her speed in any way after she shut out her two lights to you?

A. Well, yes, I did or can, but yet there was no special thing that I noticed, no one thing that I noticed more than another for a guide. As I said, there was more or less lights on the Canada side. You could see the land and trees and distinguish houses. You could tell a house from a tree, for instance, and any or all of these things I might have used. I didn't use any one thing particularly to determine that her speed was lessened, but in looking at the boat and judging from surrounding objects I could see she had lessened her speed. I am positive of it, because I thought of it at the time.

Q. Why should she check?

A. Well, going over there I suppose the man thought he was getting into close quarters and it was time to commence to check down.

Q. Close quarters with whom?

A. My tow. He may or may not have noticed the boat coming at that time.

Q. Did you think a boat that had swung around so far as to indicate to you she had gone upstream had got in close quarters with your barge that had passed below him?

A. Yes, sir, because if he had not checked down, if he had been running full speed, he would have chased the barges up enough to catch them. They were going slow even without any reference to my boat coming up at all. Of course if he noticed the space between the barges and the Canadian side and knew everything was all clear, probably it would not have been necessary to check down.

Q. If it was so clear that you could distinguish the trees and the houses and objects on the shore from where you were, it was certainly so clear that at half that distance you could discern your barge so that you could tell the stern from the bows?

A. Yes, sir, there is no doubt about that.

Q. And it was certainly so clear that through half that distance a man with good eyesight could see the barges and know all about them by looking at them?

A. I don't know exactly what you mean by knowing all about them.

Q. Knowing they were tow barges and going down the river.

A. Yes, I could tell that at least.

Q. When you first saw the New York what lights did she show you?

A. My impression is she showed me all three of the lights; head-light and two colored lights; still she was quite a little way down the river.

Q. He would be coming up around the head of Fighting island when you first saw him, wouldn't he?

A. Yes, sir.

Q. He would necessarily have to port a little to keep in the channel?

A. When?

Q. About the time you saw her?

A. After he got up this far?

86 Q. When he got within a mile of the coal docks he would be straightened up the channel, if he navigated his boat properly?

A. Yes, sir, he would not necessarily have to do any more porting until he got up to Manhattan beach.

Q. But after he got straightened up the channel, he would stand up until he got to the next turn in the river, which was at the beach?

A. Yes, sir.

Q. Are you positive now that you recollect, or do you recollect now, that you saw both his side lights?

A. Yes, sir, that is my recollection of it.

Q. And you think you blew him first?

A. Yes, sir.

Q. And he answered you promptly?

A. Yes, sir.

Q. At that time you were showing your headlight?

A. Must have been. We had started around.

Q. You had started to round out near the middle of the stream?

A. No, I don't think we had got as far as the middle of the stream.

Q. Do you think you were on the Canadian side of the center?

A. I think we must have been.

Q. The New York seemed to be about the middle of the stream?

A. No, I judged from the looks that he was considerably to the westward of the center of the stream.

Q. Why do you put him over there?

A. Because that is the most natural place for him to be, and that is where he looked to be.

Q. Is that the usual place for a boat to be in that locality?

A. Yes, sir, in my judgment it would.

Q. Why did you blow him one whistle?

A. Because I was rounding to and would have got to the dock, or didn't know but I would have to go to the dock with my barges before he would get up, and I had figured leaving plenty of room on the Canadian side for anything coming up or down to get by. That was my intention.

Q. Is that the reason you blew him one whistle?

A. Those are some of the reasons. I don't think of any other just now.

Q. Habit?

A. No. I think you will find it is the usual thing to blow one whistle, the port whistle to put me on my own side too. That is another reason.

87 Q. You got a prompt reply as soon after you saw by the lights of the New York that she was porting, taking her own side of the river, as it were.

A. Not a great while after that, yes, sir; that is, I lost the green light.

Q. And you would expect to lose it, wouldn't you?

A. Not immediately, because I watched her rather anxiously.

Q. What anxiety did you have about her?

A. After he blew his whistle I wanted to see one of those lights disappear, so I would be sure which way he was coming, not because it was the New York, but because it was a boat coming up in my way.

Q. You wanted to see his green light disappear because you knew that was the proper course for him to take?

A. Yes, sir, under the whistle.

Q. And only in that way could he clear your barges and keep going ahead?

A. I thought so.

Q. Did you continue to watch him after you saw the green light go out?

A. Not particularly. If I recollect right my mate went aft to look after the tow-line at that time, and I turned my attention towards getting out the dock. I was getting around that way.

Q. You didn't watch him after that?

A. No, sir.

Q. Did you see him again before the collision?

A. Yes, sir.

Q. What did you see of him?

A. Just saw him going by, could see the steamer going by the spars of my barges towards the other side of the river.

Q. Could you see his light?

A. I saw the red light; that I recollect distinctly.

Q. You didn't see his green light?

A. No, sir.

Q. Could you tell where it was in the river with reference to your barges?

A. At the time I saw the red light?

Q. Yes, sir.

A. I could not tell with any positiveness, I don't think.

Q. You could see her hull, could you, plainly?

A. I should think, as I recollect it now, that he must have been about the Amaranth or just commencing to come by the Amaranth, that is my third barge.

88 Q. You could see his hull plainly?

A. Yes, sir, fairly so.

Q. You could see objects on the shore?

A. If they were distinct enough to be seen.

Q. Can you tell us what part of the river the New York was navigating in with reference to the stern barges?

A. Well, I judge from the looks of them that he was keeping around the tow, to keep clear of them.

Q. Can't you tell how far he was between the tow and the bank?

A. No, sir.

Q. Did he seem to be navigating for the purpose of clearing your tow?

A. That is what it looked to me like; he was keeping clear of the tow all right when I saw him.

Q. The tow would present to him just about such a position as those two models present there on the table now?

A. Well, it is pretty hard for a man to be on one side of the river and see three-quarters of a mile across and tell the shape the boats were in, but I should judge that was about it.

Q. You didn't see any difficulty when you were watching the position of the Conemaugh a little farther away?

A. In regard to what?

Q. Checking.

A. No, and I didn't see any difficulty in seeing these, but you are asking to locate the precise condition of the barges.

Q. I say they would keep about that position of the barges.

Q. I say they would keep about that position?

A. Yes, sir.

Q. So the New York would have to come up around them?

A. Yes, sir, I think so.

Q. Tell me, please, if you can, where, with reference to the stern barges or either of them, the New York was when you heard the Conemaugh blow her second blast of two whistles.

A. I could not do that.

Q. Where was the Conemaugh?

A. I could not tell you. The Conemaugh had put her wheel aport and started practically down, obliquely down the channel.

Q. The Conemaugh had ported and was following the barges down some?

89 A. Yes, sir, he certainly had ported as far as I noticed it at the time that he had started around the other way.

Q. That was some little time?

A. That was the second blast of two whistles that she gave.

Q. She gave the first one to you?

A. No, I am speaking now of the second. That would be the hree blasts—

Q. Why do you answer my question in that way, when my question was this:

Question read as follows: "Tell me, please, if you can, where, with reference to the stern barge or either of them, the New York was when you heard the Conemaugh blow her second blast of two whistles?"

A. I understood you to mean the second blast of two whistles to the upward-bound boat. I thought you had got all done with the whistles he blew me because he was out of my road. I misunderstood the question.

Q. Where was the Conemaugh when she blew her first blast of two whistles to the up-bound boat?

A. My recollection of that is she blew them just after she commenced to port.

Q. Did you hear them?

A. Yes, sir.

Q. Are you positive about that?

A. I am.

Q. Have you heard anybody say she blew two whistles?

A. Oh, yes, I have heard hundreds of men say so.

Q. You have heard a hundred men say so?

A. Well, I didn't count a hundred. I may take a few of them back.

Q. Whether it was a hundred depends upon the number of men on the vessel, on your tow and on the Conemaugh?

A. I certainly heard it myself without any reference to what anybody else said.

Q. Where was the New York then?

A. Well, I think that was about the time—it seems to me it was about the time she was right along in here (referring to models).

Q. When they blew the first two, between the two stern barges of the tow?

A. Yes, sir.

Q. Had she got up to the Amaranth?

90 A. I would not say whether she had or not. She was in that neighborhood. She had passed the barge that was athwartships of the river, as I remember it, and was toward the stern of the tow somewhat. I would not like to say she was abreast of the Amaranth or not.

Q. Did you look at her?

A. Just when they blew the first two blasts to her?

Q. Yes, sir.

A. I could not say as I did. I was taking in the whole performance.

Q. What performance were you looking for?

A. The New York, Conemaugh and the Burlington.

Q. What performance did you expect from hearing those two blasts?

A. I thought those two fellows were going on the starboard side of one another. The fact of it is I was waiting for the New York to blow two whistles. I was wondering why I hadn't heard the second set of two whistles in answer to the Conemaugh. I could tell she hadn't because the whistles that were blown were all one tone of whistle.

Q. You could see them blown, couldn't you?

A. No, sir.

Q. Couldn't you see the steam coming from the——

A. No, sir.

Q. Where do you live?

A. West Bay City.

Q. Were you subpoenaed down here as a witness?

A. No, sir.

Q. How did you happen to come without a subpoena?

A. Do you want me to simply state how I came here, or to explain all about why I came here, or how I came here?

Q. Oh, I know you didn't walk.

A. I came on a railroad car.

Q. What induced you to come?

A. I came at the request of Mr. Shaw.

Q. Promise anything for your time?

A. Not a cent.

Q. Nor your expenses?

A. Yes, sir, they have paid my expenses so far, and I am living in hopes they will do a little more before they get done with me. Otherwise I have not got a cent.

Q. If your own anxiety about a reply to those two whistles was excited—

A. Excuse me, no, sir, I had no special anxiety, just curiosity, because I hadn't noticed the two whistles blowing.

Q. Well, if your curiosity was excited necessarily, you would look over in the direction from which you expected the reply?

91 A. I certainly did.

Q. You ought to tell us now where the boat was that you looked at.

A. I might have told you; I might locate that boat within a foot or a rod or ten rods or twenty. I might locate that boat anywhere and not know anything about it at all. These boats were moving some; the New York was moving up; the Conemaugh was moving down; all I can give you is the general impression I got.

Q. Was the Conemaugh coming down?

A. She was moving down slowly.

Q. I thought you said she was across the river, heading a little upstream?

A. She had started around this way at that time.

Q. Under a port helm?

A. Yes, sir.

Q. Why did you say a moment ago she had blown those whistles before she started around and when she was heading up?

A. I don't think I said so.

Q. Which whistle are you talking about now?

A. The whistles to the upward-bound boat.

Q. The first whistles?

A. No, the first whistles were to me, to the Burlington. The second set of whistles were to the upward-bound boat.

Q. Now, we are on the same track again; we switched off a little time ago.

A. What I meant to say is the first set of whistles of the downward-bound boat blew to the coming-up boat was after she ported her helm some.

Q. That is what I thought you testified to before you went back on it. Then you had noticed when she first blew to the up-bound boat that she had ported and was swinging to follow the boat around?

A. Yes, sir.

Q. Now, what light did the New York show to you when you looked to see where she was?

A. Her port light and masthead light.

Q. Did you notice any change in her course?

A. No, I didn't notice any change in her course.

Q. Did you notice how far the Conemaugh swung before you heard her blow two whistles again, or about how far?

A. No, sir; my impression is she was gradually coming down nearly parallel with the Canadian shore.

Q. When she blew the second blast of two whistles to the up-bound boat?

A. Yes, sir.

92 Q. What was that second blast?

A. Two whistles.

Q. Clear, distinct whistles?

A. Yes, sir.

Q. Like passing signals?

A. Not so long.

Q. Rather quick, weren't they, and short?

A. I cannot say.

Q. They then didn't differ any from the usual passing whistles?

A. Yes, sir; they were shorter than if they had not been so long a time to intervene, to get out of the way any—

Q. Did they appear to sound to you as though blown with a little anxiety connected with it?

A. I could not tell that. All I can tell you is my recollection of it, and they were a trifle shorter than if there was no trouble. For instance, if they had been meeting a boat off Fighting island here.

Q. Did you look at the New York then when that second blast came from the Conemaugh?

A. I have no recollection of it.

Q. Didn't that excite your curiosity a little?

A. Well, yes; perhaps it did, and I presume likely I looked at her, but I have no special recollection of it. This time when I noticed her coming past the Amaranth I saw her port light, and I recollect of thinking at the time: Now it looks as if she was clear of them all right. But afterwards, although I saw the boat and everybody around was talking about the danger of a collision, I could not locate it; I did not pay any special attention to it.

Q. The Conemaugh, you think, had got swung around towards a parallel course with the Canadian bank when she blew that second blast?

A. Something that way, pointing pretty well down the river.

Q. And that second blast was followed by what from the Conemaugh?

A. I cannot tell you. Whether she blew a third blast of two whistles or not I don't know, but before the two boats came together I distinctly heard the Conemaugh blow a lot of short whistles, and they were not so very short. They may have been intended for several sets of starboard whistles. Still I supposed it to be a general alarm whistle.

Q. But you cannot fit in anywhere any distinct third blast of two whistles?

93 A. No, sir, I don't recollect any.

Q. Did you hear the crash?

A. Yes, sir.

Q. How soon did that reach your ears after the alarm whistles?

A. I would not like to put it in minutes; it wasn't but a very short time.

Q. It was a very short time, wasn't it?

A. It was but a short time.

Q. Wasn't it substantially upon the alarm, following close aboard?

A. No, I think not.

Q. Do you know anything about it?

A. Well, I would not pretend to define the time between the alarm and the crash, but my impression of it is that there was some little lapse of time, perhaps—well, I would not try to put it in minutes. When a man says quite a little while, under such circumstances, he simply means, at least I do, that it is a short time. If I said ten minutes it would be too long, and if I said three minutes it would be too long. All I know is the alarm and the crash did not come together.

Q. And you cannot give us any idea of the interval of time between them as it appeared to you?

A. I would not try it. I don't think I could.

Q. When you heard the alarm, the idea of the collision appeared to you at once, didn't it?

A. Yes, sir.

Q. You expected a collision?

A. I certainly thought there would be a collision then.

Q. And you got it very soon afterwards, didn't you?

A. That is right.

Redirect.

Mr. GOULDER:

Q. That river, being something over 3,000 feet wide, what do you say as to a thousand feet being sufficient room for vessels to navigate over there?

COURT: I will take judicial notice of that, Brother Goulder. There is a good depth of water there, I believe.

Q. There is no shoal over there on that bank?

A. There is perhaps 15 or 18 feet of water up to within the Canadian bank.

Q. If vessels running along put their helm right hard over, does that check their speed?

A. Yes, sir, it does with us more or less.

Q. How promptly does that check her speed?

94 A. Well, it would have an immediate effect. It reduces the turns of the wheel. Any engineer would tell you that.

Mr. WISNER: Do you know how far the channel bank is from the shore there?

A. No, sir.

Q. Several hundred feet, is it not?

A. I don't think it is much over 200 feet, but I don't know.

Mr. GOULDER: It is 235 feet by actual measurement. We did measure that.

Court then adjourned till 10 a. m. next day.

FRIDAY, *Feb. 26th*, 1892—10 a. m.

JOHN W. JORDAN, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. Were you on the night of the Conemaugh collision mate of the Burlington?

A. Yes, sir.

Q. How long have you sailed on the lakes as an officer in steam vessels, about?

A. About 25 years, master, mate and pilot.

Q. When the Burlington started to round to, whereabouts were you yourself on the vessel?

A. I was forward of the pilot-house on the upper deck.

Q. Will you state to the court about what portion of the river you had between your vessel and the Canadian shore when the Burlington ported her helm to come around?

A. Oh, I should think we were about a quarter of the way across the river from the Canadian shore, as much as that.

Q. How far had the rounding to proceeded when you exchanged your one blast with the New York?

A. Oh, we had started around kind slow, ported, and I told the wheelsman to hard-a-port when he blowed the whistle, when we seen the New York coming up.

Q. And you were then in what part of the river, should you say?

A. We had just got nicely turned; we hadn't got to the middle yet.

Q. Where was the New York at that time?

A. She was coming up the river quite a ways down.

Q. How much down, should you say, below you?

A. About a mile.

95 Q. In what part of the river?

A. I thought she was over on the American shore, about on the range running up there.

Q. In consequence of that signal did you see the New York do anything apparently?

A. Yes, sir. Not right away; she didn't port her wheel right off; she answered our whistle as soon as we gave it.

Q. When did she port?

A. I think she ported about the time we whistled to the other boat, a little before, maybe.

Q. She was then how far down?

A. Oh, I should think she was very nearly a mile down then.

Mr. WISNER: Let me interrupt a moment. Did you say that she ported before you blew the Conemaugh?

A. Yes, sir.

Mr. GOULDER: In coming down there, Mr. Jordan, where had you got when you blew the signal to the Conemaugh?

A. We had got around about three or four hundred feet from the dock, and straightened pretty well up the river, so we were heading pretty well up the river.

Q. Showing her what lights?

A. Green light and masthead light.

Q. Will you state whether the Conemaugh replied to that whistle and how promptly?

A. Yes, sir, she replied to it promptly.

Q. What did you then see and hear in reference to the Conemaugh, if anything?

A. She starboarded her wheel, swung around and showed us her green light, stern light and cabin light. She looked as if she was about abreast of us, broadsides to us; heading up the river.

Q. You don't mean abreast of you up and down the river?

A. No, sir, showing broadsides. I could see her cabin lights, green light and stern light.

Q. Did you hear any engine whistles on her?

A. I didn't.

Q. Do you know anything about her speed, whether it was or was not checked?

A. She was going slow. I should think she had just good steerage way on. You could tell by the background of the water as she was passing.

Q. Did you see her coming over towards the place of the collision?

A. Yes, sir.

Q. As she went over there what lights, if any, did she show to you, and did you see?

A. I saw her green light. I didn't see her other light; only her green light and her bright light and her cabin light.

Q. And her masthead light?

A. I didn't notice her masthead light after she got by; after she got well over.

Q. Will you describe the approach up the river of the New York, so far as you saw it?

A. When I looked at the New York she was porting her wheel and showed us her red light, heading across and up the river.

Q. What attention did you give to her as she came up?

A. Well, I watched her, because I wanted to see her clear our barges, whether she was going to come close to our barges or not. Our first barge had got around so I could see her colored light, and the second barge was coming around opening her light just as the New York passed the third barge. I could see the barge between the New York—or the New York between us and the barge, and I could see she was passing the barge that way, and I watched her until she had passed the stern barge.

Q. Do you mean that you saw the New York between you and the barge?

Objected to as leading. Objection withdrawn.

A. Oh, no, sir.

Q. How long did you continue to watch the New York?

A. I watched her until she passed the last barge, then I went over and got my lines out; we were then pretty close to the dock.

Q. At that time, when you were watching the New York go up there on your barges, what, in your best judgment, was the space between the barges and the Canadian shore?

A. I could not tell. I was not over there, you know, but my best judgment would be that they would follow around pretty near where we were.

Q. Taking now your knowledge of the manœuvre of your vessel, and the extent to which it had progressed, aided, if it was aided by your observation; taking now all the knowledge you have on the subject, what do you say to the court was about the space?

A. Oh, I should think it was about; it must have been six or seven hundred feet, anyhow.

Mr. KREMER: Between the barges and the Canadian bank?

A. Yes, sir.

Q. Was it in your judgment at that time more or less than when you turned?

97 A. I could not answer that.

Q. At that time, when you say you saw the New York coming by the last barge, how far, in your judgment, above the New York, was the Conemaugh?

A. Oh, she was quite a ways. She was 700 or 800 feet, I should think.

Q. What, in your judgment, about the speed of the New York as she was coming up there?

A. She seemed to be passing the water pretty fast.

Q. At what speed should you say?

A. I could not tell you the exact speed, I should think she was going nine or ten miles an hour, anyway.

Q. When you saw the New York passing your last barge, what did you do?

A. I went over on the port side and got out my head line.

Q. Did you hear the crash of the collision?

A. Yes, sir.

Q. What were you doing when you heard that?

A. I was getting out my head line. I had got out my heaving line on the deck, and was ordering my men where to put the line. When our barges got clear of the New York I considered we were all right, and I didn't pay any more attention to it until I heard the crash.

Cross-examination.

By Mr. KREMER:

Q. In arriving at the distance you were from the Canadian bank you do so from what you could see, do you not?

A. Yes, sir.

Q. Now, after you had got to the opposite side of the river you could still then see the Canadian bank on the other side, could you?

A. I could see where it was; I could not see the bank distinctly; it was dark.

Q. How are you able to locate the barges then within six or seven hundred feet of the bank?

A. I could see the shade of the bank and the barges over there.

Q. Then it is from what you saw of the bank that you make up this distance, and of what you saw of the barges?

A. I judge the distance some by the time we turned there. We don't want to get very close to the bank in turning around with tow barges behind us. We generally calculate to leave plenty of room, and I judge by the way the barges followed us around.

98 Q. Your best judgment is they were 600 or 700 feet away at the time the New York passed the last barge?

A. I should think they were, yes, sir.

Q. Why did you go to the Canadian bank at all to round to at Smith's dock?

A. So as to give room to turn around our tow.

Q. How long a tow had you?

A. We had four barges.

Q. About half a mile long?

A. Very near, I should think.

Q. And you went to the Canadian side because you wanted room to turn that half mile of a tow?

A. Yes, sir.

Q. And therefore you went close to the Canadian bank?

A. We always go pretty well over.

Q. And that was the reason you went close?

A. Certainly that was the reason.

Q. Why didn't you go closer than you did to the Canadian bank?

A. We didn't consider it necessary to go any closer; we had plenty of room; we can turn in half the river. The captain was piloting the boat, I was not.

Q. Did the Conemaugh at any time shut out her green light to you?

A. No, sir.

Q. Kept it in view all the time?

A. Yes, sir, all the time I was looking at it.

Q. Did she head athwartships of the channel, or did she head up a little?

A. I could not say. I could see her broadsides, that is as near as I could tell you.

Q. How far was she away from you at that time?

A. When she went across?

Q. Yes, sir.

A. Oh, she was probably, when she first turned, three-quarters of a mile; from half to three-quarters of a mile.

Q. What light of the New York did you see first?

A. I saw three lights, both colored lights and masthead light.

Q. And those remained in view a short time?

A. Yes, sir.

Q. And then she closed her green light?

A. Yes, sir.

Q. And from that time continued to show her red light until you stopped watching her?

A. Yes, sir.

Q. Were you using the vessel's glasses while making the observations of the New York and Conemaugh?

99 A. I was not. The captain had the glasses on the pilot-house.

Q. What is your age?

A. I am 52.

Q. Your eyesight is good?

A. Yes, sir.

Q. You had no difficulty in making out the barges?

A. No, sir, I could see the barges passing between the lights.

Q. What lights?

A. The New York's lights when she passed our barges. I was watching the barges to see that they came around all right. That is what I was doing at the time, more especially than anything else.

Q. Why were you anxious about the barges?

A. There was two propellers, one coming down and the other up, and there was a string of barges across the river, and I wanted to see that the barges got along all right.

Q. You didn't expect the Conemaugh to run in the barges?

A. No, sir, I didn't expect anything to run into them; but we always watch our barges in a case of that kind.

Q. You were interested in watching the Conemaugh and the New York with reference to each other?

A. No, sir.

Q. Simply watching the New York pass your barges?

A. That is what I was watching.

Q. When you saw she had done that you stopped looking?

A. Yes, sir, I went over and got my lines out.

Redirect.

Mr. GOULDER:

Q. I don't know as you stated how near to the dock your port side was when you went over there to put out the lines?

A. When we first blew to the Conemaugh?

Q. No, I mean when you went over there.

A. Oh, we were close in. I don't think we were over 40 feet from the dock. We were close enough to throw a heaving line anyhow.

By the COURT:

Q. Did you hear any signals?

A. I heard the Conemaugh blow two signals, whistles.

Q. Where then was the New York?

A. She was just turning down below when she blew the first two whistles.

100 Q. Which first two do you mean?

A. We blew two at her, and she answered it right away. Afterwards she blew two whistles. I supposed to the New York.

Q. Where was she then?

A. She had started across the river then, and the New York was turned and coming up.

Q. Where was the New York with reference to your tow?

A. She was way down below the tow then, probably a mile or three-quarters of a mile below.

Q. Did you hear any other whistles?

A. I heard the Conemaugh blow two more whistles after that.

Q. Where then was the Conemaugh?

A. She was two-thirds across the river.

Q. Where was the New York?

A. She was coming up then, maybe half a mile below our barges.

Q. At the second signal of the Conemaugh?

A. Yes, sir.

Q. Where was the Conemaugh with reference to your stern barge, if you could see?

A. She was up above the stern barge at that time; quite a ways up the river.

Q. Could you tell her heading?

A. No, sir, not exactly. I knew she was heading right across the river. She went right across over to the Canadian shore, that is all.

Q. Did you hear any other signals after that?

A. I didn't notice any other signals. The danger signal, I didn't notice that. I was over there getting my lines out and I didn't pay any attention to it. The next thing I heard was the crash.

DOMINICK JEANS, after being duly sworn in behalf of the libellants, testified as follows:

Examined by Mr. GOULDER:

Q. You were captain of the barge Amaranth at the time of this collision?

A. Yes, sir.

Q. I wish you would describe the approach up the river of the New York until she passed your boat, and the position in the river of your boat, heading of your boat at the time she passed you.

A. When I first saw the New York I was heading down
101 the river. I saw her bright light, and green light and mast-head light, so I put my wheel hard-a-port so I would show him my red light, so he would keep clear of me.

Q. How was he then apparently heading with reference to your boat?

A. He was heading pretty near for me.

Q. How long did he continue to head so for you?

A. I would judge about 10 or 15 minutes.

Q. Then what did he do?

A. Well, I guess he ported his wheel.

Q. What made you think he ported his wheel?

A. Because I saw him sheer out and lost his green light.

Q. How close up the river had he got when you saw him sheer?

A. He was, I would judge, six or seven lengths from me, maybe more.

Q. How close did he pass by you?

A. I would say he passed within 150 feet, maybe 100 feet.

Q. How far was your tow, you or the stern barge, whichever was furthest out; how far was that from the Canadian shore, what part of the river?

A. I would judge we were about one-quarter from the Canadian side.

COURT: Yours was the third barge of the tow?

A. Yes, sir, and I was heading right down the river.

Q. How did the New York seem to come as to her speed?

A. Well, she seemed to me to be coming pretty good speed, when he passed by me.

Q. What was there that made you think so?

A. On account I did have no headway. I was coming with the current, and I thought he was going ten miles an hour anyway. It didn't take me very long to lose him.

Q. Let me ask you; did you see or notice any change in her speed at any time?

A. No, sir.

Q. Hear any engine whistles aboard her?

A. No, sir.

Q. Did you hear the New York blow any signals at all that night?

A. No, sir.

Q. What did you see of the Conemaugh?

A. When I first noticed her, I saw him coming down the river I thought he was a little in the center of the river, or a little more on the American side; and I saw him after we began to turn around starboard his wheel; I thought he was going under our stern. I watched him closely, and I saw his green and red light and masthead light along, until he came to sheer on the Canada side, then I lost his red light and I saw his green light.

Q. Were you looking at the boats at the time of the collision?

A. I was, sir.

Q. Where was the collision?

A. I would judge about a thousand feet away from me.

Q. Up the river?

A. No, sir.

Q. How close to the American shore?

A. I cannot tell that.

Q. What was your judgment?

A. That I don't know. I would judge I was about a thousand feet then from the New York and the Conemaugh, but I don't know where the bank is, how far the deep water is over there, I could not swear to that. I would judge it was close.

Q. You may state whether or not you, at any time, lost the green light of the Conemaugh?

A. No, sir, I did not.

Q. How was her masthead light?

A. It was shining all right, as good as any other light.

Q. What kind of a light was her green light?

A. Showing good.

Q. What signals, if any, did you hear the Conemaugh give?

A. I heard the Conemaugh blow two whistles.

Q. How many times did you hear that?

A. Three times.

Q. Did you hear any other whistle from the Conemaugh?

A. No, sir, not that I know of.

Q. You don't remember of any other?

A. No, sir.

Q. Did you hear any engine signal on the Conemaugh that you remember of?

A. No, sir.

Q. At the time of the collision did you hear any engine signal on the New York?

A. Yes, sir, I heard two, first.

Q. When was that?

A. After the collision was over.

Q. Two first; what next did you hear?

A. One.

103 Q. Which was first, the crash or those two engine whistles?

A. The crash was first.

Cross-examination.

By Mr. KREMER:

Q. Did I understand you to say that the collision occurred close to the Canadian shore?

A. I think so.

Q. Did you hear the crash of the collision?

A. Yes, sir.

Q. Were you looking that way at the time?

A. Yes, sir.

Q. And which side of the Conemaugh was struck?

A. I think she was struck on the starboard bow, if I ain't mistaken.

Q. And where was the last barge at that time?

A. The last barge was right astern of me.

Q. Where was the last barge with reference to the collision?

A. That I don't know; she was coming down the river, following me, coming around. She was following my light, I presume.

Q. You were out in the river?

A. Yes, sir.

Q. Heading about across the river?

A. Yes, sir; pretty well across by that time.

Q. And the other barge, had she turned at the time of the collision?

A. She had begun to turn.

Q. Did the collision occur abreast of the last barge, or just astern of her?

A. A little astern of her, I would judge.

Q. How long have you sailed?

A. About 24 or 25 years on the lakes.

Q. How long have you been master of vessels?

A. About 18 or 19 years.

Q. Where do you live?

A. In West Bay City.

Q. How long have you lived there?

A. Since I came up on the lakes, 24 or 25 years ago.

Q. And you say from first to last you heard the Conemaugh blow two blasts three times?

A. Yes, sir.

Q. You didn't hear any alarm whistles?

A. No, sir.

Q. When did she blow the last time?

104 A. When she blew the last time, I would judge she was pretty close to the Canada shore.

Q. Just before the collision?

A. Yes, sir.

Q. Didn't the collision follow right after you heard those whistles?

A. Pretty near.

Q. And she blew two whistles before that time, signals?

A. Yes, sir; she did, sir.

Q. When you first saw the Conemaugh, the New York was showing you her red light?

A. Both of them, red and green light and masthead light.

Q. Before the Conemaugh turned, the New York had also ported, had she not?

A. A little.

Q. So she was showing her red light?

A. Yes, sir, showing her red light to keep clear of me.

Q. You saw the New York port and then saw the Conemaugh starboard?

A. Yes, sir. Well, I was not close; they were both going over towards Canada.

Q. The New York passed you, you say, within a hundred feet?

A. I guess she did, about 100 feet, as near as I can recollect.

Q. She was passing you on a proper course; was all right?

A. Yes, sir.

Q. And as she was heading, she would pass the last barge about the same way?

A. Yes, sir.

Q. What cargo did you have?

A. Lumber, sir.

Q. How much lumber will your barge carry?

A. About 320 to 330.

Q. What is her tonnage?

A. I think her tonnage is 247.

Q. And she had 320,000 feet of lumber?

A. Yes, sir.

Q. Did she have any deck-load?

A. I had, I would judge, about 9 feet of deck-load, about eight or nine.

Q. That is above the rail or above the deck?

A. From the deck to the top of the rail.

Q. Where were you standing at the time of the collision, and during all this time?

A. I was standing on top of the load, way aft.

105 Q. How much higher was your deck-load than your cabin?

A. I would call it about five feet.

Q. How much above your rail was your deck-load?

A. Well, it would be about six feet from the rail.

Q. Were all the barges loaded with lumber?

A. Yes, sir.

Q. Was it dry or green lumber?

A. That I don't know. Mine was half and half.

Q. You mean to say it was about half dry and half green, or half dried?

A. It was mixed up; it was about 60 or 70 days cut.

Q. Is that why you had such a deck-load?

A. Oh, I always carry about the same load.

Q. How much side did you have out?

A. About two or two and a half feet side.

Q. Midships?

A. Yes, sir.

Q. How many spars had the Amaranth?

A. Two.

Q. Did she have any sails set?

A. No, sir.

Q. Did you have any sails set up at all?

A. No, sir.

Q. Who was on deck besides you, on the Amaranth?

A. The mate was.

Q. Anybody else?

A. Well, I had one man at the wheel, of course.

Q. How much of a line did you have out to the barge ahead?

A. Well, I guess I had between 475 and 500 feet.

Q. How much of a line was there to the Ferguson?

A. I don't know.

Q. Was it longer than yours?

A. I can't tell anything about that.

Q. You could tell pretty near whether it was 200 feet or 600 feet?

A. I could not swear to that at all.

Q. Then you don't know whether it was 100 feet or 500 feet?

A. No, sir.

Q. You haven't got any judgment as to distance at all, have you?

A. Maybe she had 400 feet and maybe 500 or 450.

Q. Then you think it was less than 400 and not more than 500?

A. Yes, sir.

Q. Then you have some judgment about it?

106 A. I thought he was about the same distance as I; maybe a little closer. Maybe a little farther for all I know.

Q. About how fast were you moving when the New York passed you?

A. Oh, I was just going down about three miles an hour; two and a half or three.

Q. How much speed did you have on when you commenced to turn?

A. I was going at that time at about three and a half miles an hour, when I put my wheel hard-a-port.

Q. What is the current there?

A. I don't know; I would judge about two miles an hour.

Q. You were going then a little faster than the current?

A. Yes, sir.

Q. Had your wheel hard over when the New York passed?

A. My wheel was hard-a-port, sir.

Q. The first whistle that the New York blew or that the Conemaugh blew was blown to the Burlington?

A. I guess it was; it must be.

Q. Do you know which one blew first, the Conemaugh or the Burlington?

A. The Burlington blew first.

Q. And the Conemaugh did what?

A. Answered with two blasts.

Q. Then what did the Conemaugh blow?

A. A few minutes after that she blew one more blast again.

Q. Had the Conemaugh then starboarded?

A. Yes, sir, he was starboarded then; going near the Canada side, I presume.

Q. Where was she when she blew to the Burlington?

A. She was pretty well up the river.

Q. A mile away?

A. I should judge between a mile and three-quarters of a mile.

Q. Then she starboarded?

A. She starboarded a little while afterwards.

Q. Did you ever see her port or steady after that?

A. I saw nothing of that kind. I saw him coming along slowly, starboarding his wheel.

Q. And he did not change his course at all that you could see?

A. No, sir, not where I was.

107 Q. Where was the last barge, or where was he with reference to the last barge when he blew his first signal to the New York?

A. I would judge the Conemaugh was then about seven or eight hundred feet from the last barge.

Q. On which side of the last barge?

A. Well, pretty near right astern ; a little more to the Canada side.

Q. Then the Conemaugh had passed your last barge ?

A. No, sir.

Q. He had got to the Canada side of her ?

A. He didn't need to pass the last barge to get over to the Canada side.

Q. Now, let me understand you. You say he was seven or eight hundred feet from the last barge, on which side of the last barge was he ?

A. He was right astern and going a little on the port side of her, and he was pretty well over to the Canada side.

Q. Then he was on the port side of the last barge when he blew his signal to the New York ?

A. Yes, sir, he was right opposite when he blew his two whistles.

Q. He was right opposite when he blew his two whistles ?

A. Right astern of her.

Q. Then he was under a starboard helm ?

A. That I don't know. I was not aboard the New York. I was aboard the Amaranth. I could not tell what he was doing. I know he was heading for the Canada side all the time.

Q. He was heading right for the Canada bank ?

A. Not right plump for the Canada bank ; going slantwise like.

Q. And he kept going slantwise for the Canadian bank as long as you saw him ?

A. Yes, sir.

Q. Now, what was the last whistle that he blew, that you heard ?

A. He blew three times.

Q. What did he blow when he was under the stern of the last barge ?

A. He blew two whistles.

Mr. GOULDER : He has not put him under the stern of the last barge.

Q. Place the Conemaugh with reference to the last barge.

(The chart is turned over and the position of the models thereon is marked.)

108 Q. Now, Captain, are the vessels in position now ?

A. Yes, sir.

Q. When is this you have got them now, what time ?

A. At the time we turned around.

Q. You are turned around now ?

A. No. I ain't turned around yet, turning around.

Q. What signals are being blown now ?

A. The Conemaugh blew two whistles to the Burlington.

Q. This is the position then at the time the Conemaugh blew two whistles to the Burlington ?

A. Yes, sir.

Mr. GOULDER : I further mark this with the figure inside the representation of each vessel.

Q. Put them in the position when the Conemaugh blew her first to the New York.

A. About half way from the Ferguson and the place where she blew the Burlington. The New York was at that time showing me both lights.

(The boats are now marked with the figure 2 inside of each representation.)

Q. Now, haven't you stated that at the time she blew her two whistles to the New York, she was astern of the last barge?

A. So she was, that is the last barge.

Q. You call that astern of her then, that way?

A. Yes, sir, and aside of her, too.

Q. But didn't you say she was astern of her, right behind her?

A. Well, I call that astern of her. No matter whether she was a little way to one side or the other or not.

Q. Is that the way she was when she blew two whistles.

A. Yes, sir, and I presume she was moving ahead all the time, but I cannot tell how fast she was going. I would judge she had blown those two whistles three times and took about three or four minutes to do it, and all that time she was going ahead.

Q. Where was she with reference to the last barge when she blew the two blasts the next time?

(Witness places models.)

Q. Where was the New York at that time?

A. She was coming down showing me the red light and green light. She was a little closer to me all the time.

Q. Showing you her all three lights?

A. Yes, sir.

109 Q. The position of the New York and Conemaugh at the time the Conemaugh blew her second signal of two blasts are indicated by figure 3?

Mr. WISNER: He places the Conemaugh directly astern of the rear barge at the time of the second whistle?

A. Yes, sir.

Q. Now, where were they with reference to each other when the next whistle was blown?

A. They were pretty close together. The New York had passed me then.

Q. The New York had passed the Amaranth?

A. Yes, sir.

Q. And she was passing her on the same course she had been on before that?

A. Yes, sir.

Q. So far as you know after the New York had shown you the red light, she kept coming on a straight course right down towards you?

A. Yes, sir.

Q. She made no change of course that you saw?

A. Not that I know of. As long as she was clearing me she was clearing the other barges too.

Q. And the Conemaugh made no change of course?

A. Not that I know of.

Redirect.

Mr. GOULDER :

Q. The New York, you think, when she passed your barge was headed as much towards the Canadian shore as is indicated in this picture, "New York 3"?

A. I think so, as near as I can tell. Of course, it was pretty dark.

Q. And she kept going over in that way, as you say, until she hit the Conemaugh which was up the river?

A. Yes, sir.

Q. And what, Captain, with your vessels in that shape, and this vessel passing you, I think you said within 75 or 100 feet, what was there to prevent the New York from starboarding and coming out alongside of the Ferguson and going up the river?

Mr. WISNER : I shall object to that as not material, because the New York's duty was defined by law, and whether she might have done something else or not in the way of changing her course makes no difference, as she was under no obligation to do so. It would be only putting in the record here something that has no bearing on the case.

Mr. GOULDER : This witness has shown one change of course in the New York——

110 Mr. WISNER : Then she has violated her rule.

Mr. GOULDER : And I want to show there wasn't anything at all that a seaman could see to prevent the New York, if properly handled, from coming right on up here. She had made that change of course as I suggested at the outset because of the course which she had adopted with reference to us in the first place, she was going to have a collision with this man's barge or go dangerously near to him and made this alteration of her course while under the proper signal from us, and while under the obligation of the law to hold the course she was on. She could have checked down there and held that course, she could vary from it on her responsibility, and I want to show that having varied from it, as this witness says she did, and come out here and cleared here, if properly handled, there was nothing to prevent her from coming out here and going up the river under a starboard helm.

Court : You may ask the question.

Q. The New York having come up here, so as to look clear of you, as you say, by closing her green light, what was there to prevent her starboarding in time and coming up here around the Ferguson and out in the river again?

A. That would be a hard matter for me tell on account I was not aboard of that steamboat, but I should think they had all the chance in the world to do so.

Q. That was your judgment standing there that night?

A. That was my judgment. My judgment is not another man's judgment.

Q. And when the Conemaugh answered the Burlington's whistle of two blasts, she was how far up the river?

A. I would judge she was maybe three-quarters of a mile; I could not tell exactly.

Q. A good long distance up?

A. Yes, sir.

Recross.

By Mr. KREMER :

Q. The New York could not starboard until she got clear of the last barge, could she?

Mr. GOULDER: Well, could not starboard her wheel or swing to port.

A. That is all right. I know. Starboard her helm, yes, sir. I think she could starboard to pass me, bring him back slowly, on account of the Ferguson was astern of me.

Q. She could not starboard any more than just to allow her to clear the last barge?

A. I suppose not.

111 Q. It would not do for her to hard-a-starboard when abreast of you?

A. No, sir.

Q. It would not do for her to hard-a-starboard at any point unless she could clear that last barge?

A. No, not before she cleared the last barge.

Q. Then you don't know whether she did or not?

A. No, sir.

Q. All you want to say is, that after she got in a position where she could clear the last barge, then she could starboard her helm?

A. Well, a little before that. The Ferguson was on a line with me, and about that far from us she could starboard and give him a chance. This is my judgment, of course.

Q. You say the Ferguson was in line after you?

A. Yes, sir, a little more to the American side, if anything. Maybe he got a little scared and ported his wheel before.

Q. And the New York passed you within 75 and 100 feet?

A. Yes, sir, as far as I could tell. It was hard to tell in the night.

LOOMIS P. SMITH, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER :

Q. You were the master of the barge Ferguson?

A. Yes, sir.

Q. When the New York passed you, and also at the time of the collision between the Conemaugh and the New York, how far in your

best judgment do you place your boat off the Canadian shore, what part of the river?

A. I was about one-third of the river from the Canadian shore out.

Q. How far above your vessel do you say that collision occurred?

A. The best of my judgment between three and four lengths of the Conemaugh, somewhere about that, about a thousand feet.

Q. Where did it occur with reference to the Canadian side of the river?

A. It was close on the channel bank. I think the Conemaugh was in the mud. I don't know.

Q. You think the Conemaugh was already in the mud at the time of the collision?

A. Yes, sir, I thought so.

Q. Where was the Burlington with reference to your
112 vessel at the time of the collision?

A. She was at Smith's coal dock and a little up the river from me, if anything.

Q. A little up the river and opposite of you?

A. Yes, sir.

Q. And that distance that she was up, are you able to give it or didn't you notice it carefully enough?

A. Not definitely, no. She might have been about half a length of the dock, I could not tell from that distance.

Q. She might have been a half a length of the dock further above you in the river?

A. Yes, sir.

Q. And to the other side?

A. Yes, sir. I was just about abreast of the lower lights on the dock.

Q. Did you hear the exchange of whistles between the Conemaugh and the Burlington?

A. Yes, sir.

Q. An exchange of what signals?

A. Two blasts.

Q. How promptly did the Conemaugh answer the signals?

A. Almost immediately.

Q. Did you at that time look at the Conemaugh?

A. Yes, sir.

Q. Do you remember of hearing any engine signals aboard of her?

A. I think I did.

Q. What signals do you think you heard?

A. Three short blasts of the small whistle.

Q. That is a check whistle?

A. Yes, sir.

Q. And when was that with reference to the time of answering the Burlington?

A. Almost immediately.

Q. What did you see the Conemaugh do, if anything, at that time?

A. She swung to starboard. He put his wheel to starboard and swung to port upstream; heading up across the stream; didn't swing heading upstream.

Q. To what extent did he swing with reference to a line right across the stream?

A. About parallel. About straight across the river.

Q. Parallel with such a line straight across the river?

A. Yes, sir.

Q. That is the way it seemed to you?

A. Yes, sir.

113 Q. Did you from that time see any change in his course, and if so, what was it?

A. After he went across the river and ported his wheel I followed him along down the river, he ported so he showed me just a glimmer of his red light before he started again.

Q. A glimmer of his red light, and what other light did you see?

A. His green light and masthead light.

Q. The green light and masthead light at that time and during that time, how did they seem to be burning?

A. Very bright.

Q. Did you hear the Conemaugh, after her reply to the Burlington, blow any other signal with her big whistle?

A. Yes, sir.

Q. What signal and how many — did you hear it?

A. Just after she starboarded her wheel to come across the river, she blew two blasts to the steamboat below.

Q. Was there any answer to that?

A. Not that I heard.

Q. Did you hear the Conemaugh blow any other signal?

A. Yes, sir, two blasts more.

Q. Was there any answer to that?

A. No, sir.

Q. Did you hear any other signal after that?

A. She followed that with two more, and then the danger signal.

Q. Was there any answer to that?

A. No, sir.

Q. After you heard the exchange of signals between the Burlington and the Conemaugh, and gave your attention to the Conemaugh there, did you hear any whistle on the New York at all?

A. No, sir.

Q. Did you give any heed to the New York as she was coming up the river?

A. I did at one time.

Q. Will you describe as well as you observed, and can you tell us now, the approach of the New York up the river?

A. Yes, sir; when I first noticed the New York, the Burlington blew one whistle to a boat down the river.

Q. We will call that boat down the river the New York; we know it was she.

A. When I first noticed her she was well down the river.
114 She blowed one whistle, but I don't know whether she answered or not; I suppose she did, but I didn't hear it. She was too far away for me to hear it anyway. And shortly after that he put his wheel to port and started for the Canadian shore. He was well over to the American side coming up, and I watched him right along until I got the blasts of the Conemaugh. Then I had to watch them both. He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us. I put my wheel hard-a-port, and almost immediately he ported his wheel, or must have, because he had his green light from us.

Q. As the New York was coming at the time, you say, you think you observed her porting, where would she have gone had she held that course and come right along, when you thought you observed her porting, before you lost her green light?

A. She would have come right through the Amaranth or me; struck us.

Q. You may state whether or not that was your judgment at that time.

A. That was my judgment at that time; she was either going to hit the Amaranth or myself.

Q. How far did she clear you?

A. From 50 to 100 feet, I should judge.

Q. At that time how were you and the Amaranth with reference to each other; for instance, first, how were you heading as to the Amaranth, when that steamer came up by you?

A. We were both heading a little diagonally across the river. Probably swinging from the American side of the river from two points about to starboard.

Q. Do you remember how you were heading as to the Amaranth?

A. We were both heading about the same. I should judge I was astern of her, maybe heading on his quarter. It looked as if we were heading about the same.

Q. And as to the Ferguson and Republic, at that time, if there was any difference at all, which of you was over further towards the Canadian shore?

A. I don't think there was any difference.

Q. When the New York came by you, which way was she heading, whether directly up or towards the American, or towards the Canadian side?

A. She appeared to me to be heading a little towards the Canadian side.

Q. Did you observe her as she went up there from that point up to the collision?

115 A. Yes, sir.

Q. Did you look out then and see both of them?

A. Yes, sir.

Q. Can you tell the court anything about the course of the New York after she passed you, whether she wavered to one side or the other?

A. No, sir, I cannot tell you whether she swung one way or the other.

Q. Now, Captain Smith, what do you think about the speed of the New York?

A. She was coming very fast; probably ten miles an hour.

Q. Was that boat going up there under a checked speed of four miles an hour?

A. No, sir, she was not; if she was, it was a very fast four miles.

Q. Now, Captain, suppose that the New York, when she passed you, was under a starboard helm, and as she passed you started to swing to port, where would she have gone with reference to the Conemaugh, as you saw the situation?

A. It seems to me she would have went clear of her.

Cross-examination.

Mr. KREMER:

Q. How much is one-third of a mile, how many feet?

A. I don't know exactly. I don't know as I know exactly how many feet there are in a mile.

Q. Is it less than a thousand feet?

A. I could not say.

Q. Is it about a thousand feet?

Objected to as immaterial. You might as well ask him how far it is up to the Cadillac hotel.

COURT: He has a right to test the witness.

Q. What is the width of the river at the point where this collision occurred?

A. I don't know as I ever heard.

Q. Do you know whether it is a thousand feet?

A. I should judge it was more than that.

Q. Two thousand feet?

A. More than that. I should think it was about three-quarters of a mile. I don't know, though.

Q. What would you say as to the distance you were from the Canadian shore in feet, at the time you were rounding there?

A. I would not say anything about it, for I don't know.

Q. Do you think it was more than 500 feet?

116 A. I was about one-third of the way across the river from the bank; whether it was four feet or whether it was 20. I am not putting it into feet. I am putting it one-third of the way across the river.

Q. Was it the length of the Conemaugh?

A. Yes, sir, and more.

Q. How much more?

A. It was twice or three times her length anyway.

Q. And you at no time was nearer than three times the length of the Conemaugh from the Canadian bank?

A. No, sir.

Q. What is the length of the Conemaugh?

A. I don't know. I think I have heard, but I don't know.

Q. Is she longer than the Ferguson?

A. Yes, sir.

Q. What is the length of the Ferguson?

A. 136 feet.

Q. Is the Conemaugh 200 feet?

A. Yes, sir, I think so. I have heard she was 250 feet.

Q. What is your judgment about it?

A. I should think she was that long.

Q. Then you think she was that distance from the Canadian bank; was 750 feet from the Canadian bank?

A. I would not put it in feet at all.

Q. If it was three times the Conemaugh's length and she was 250 feet long, that would be 750 feet. Is that what you mean to say?

A. I mean to say I was one-third of the way from the Canadian bank across the river.

Q. Then you do say, or haven't you said, she was three times the length of the Conemaugh from the Canadian bank?

A. No, sir, I don't. I said she might have been that.

Q. Was she?

A. Yes, sir, we might have been more, maybe.

Q. Was she any less?

A. I don't think she was.

Q. Then isn't it your best judgment that she was about 750 feet from the Canadian bank?

A. I am not putting it into feet at all.

Q. How many lengths of the Ferguson was she?

A. I don't know.

Q. Then you can judge no distance by feet at all. Do I understand that? You are not capable of judging any distance by the number of feet?

A. I might be, yes, sir.

Q. Are you?

117 A. Yes, I think I am.

Q. Now, then, will you tell me how many feet you were away from the Canadian bank at that time?

A. No, sir, I will not.

Q. Can't you do it?

A. Not in the night I could not do it.

Q. Can you in the daytime?

A. I might, if I was there in the daytime.

Q. You could see the bank, could you not?

A. I could *could* see the shadow of it.

Q. Did you have any difficulty in seeing the bank?

A. I might have difficulty in picking up an object, but not the lay of the bank.

Q. You had no difficulty in seeing the bank and telling that there was water between you and the bank?

A. No, sir.

Q. You know what the length of your tow is?

A. Yes, sir.

Q. Tell me how many lengths of your tow you were away from that bank?

A. I cannot do it definitely.

Q. Then you would say you are no judge of distance on the water?

A. No, sir, I will not say that.

Q. How do you arrive at the distance that you say you were from that bank when you say you were one-third of the distance over?

A. By looking at one side and the other side, and seeing that it was twice as far one way as the other.

Q. You had no difficulty in arriving at that?

A. No.

Q. And yet you are absolutely unable to tell me the number of feet you were away from that dock?

A. Certainly I am.

Q. How do you happen to know, if you cannot tell that, that this collision occurred about a thousand feet from you?

A. I judged that from the distance, and the time we run down there?

Q. You saw what was going on, didn't you?

A. I saw the two boats would come together.

Q. And you saw also the water that there was between where you were and the collision?

A. Yes, sir.

Q. And you judged that distance to be a thousand feet?

A. Yes, sir.

Q. Why can't you give me the same judgment on the distance you were from the Canadian bank?

A. Because I cannot.

Q. Is it because you don't remember it that way?

A. No, I don't know as I understand your questions.

Q. Who told you to say that it was a thousand feet from you that this collision occurred?

A. Nobody.

Q. Who told you to say that you were a third of the distance from the Canadian shore?

A. No person.

Q. Why do you remember those two distances differently?

A. I know we always take that course and round to one-third of the way and leave room for other boats.

Q. That is because you usually do that?

A. Yes, sir.

Q. That is all you know about it? You simply know because you usually do that; is that it?

A. I know it from looking across the river, and looking at the bank.

Q. On this evening or other times?

A. This evening as well as other times.

Q. You say because you usually do that, that it happens to be one-third of the distance—

A. No, not because it happens to be one-third of the distance, but because we always use that.

Q. Will you say you remember it as it was that evening or you remember it because it was usually one-third of the distance?

A. I remember it as it was that evening.

Q. Will you tell me how you came to say that that collision occurred a thousand feet from you?

A. By using my judgment.

Q. Then you can judge of distance on the water by feet?

A. I have not said that I could not.

Q. Haven't you told me that you could not judge of distance on the water by feet?

A. It was lighter over that way.

Q. Was it any lighter at the time of this collision towards the Conemaugh?

A. It was a little lighter towards the Conemaugh on account of her lights than it was towards the Canadian bank.

Q. And therefore you could tell the distance better?

A. I don't know as I could.

Q. Did the collision occur abreast of the Ferguson?

A. No, sir.

119 Q. About what direction from the Ferguson did it occur?

A. It was up the river some place.

Q. Off your port quarter?

A. Yes, sir. She was to the port side of the river, further up the river than I was.

Q. And the New York had passed you within fifty feet?

A. Within 50 or 100 feet, I cannot say exactly.

Q. Did you say the collision occurred off your port quarter up the river?

A. It was on the port side of me and up the river.

Q. Was it directly astern of you, or on your port quarter, or abeam of you?

A. It was on my port quarter and astern.

Q. How many points, do you think?

A. It bore off between two and three points.

Q. And you say the Conemaugh was virtually on the bank when she struck?

A. I think so. I don't know for a certainty.

Q. From what you saw?

A. That is my opinion of it.

Q. How close did the New York pass the Amaranth?

A. She passed her fully as far from her as she was from me—50 or 100 feet.

Q. She passed you what you would call close, didn't she?

A. Well, you would call fifty feet close with a big boat like that, and us little fellows.

Q. When the Conemaugh was blowing her whistles to the New York, she was on your starboard hand astern, wasn't she?

A. Yes, sir.

Q. And when she blew the alarm whistles, she had got under your stern?

A. She was directly astern of me.

Q. And the collision occurred immediately after that?

A. Shortly after that.

Q. Were you looking at the vessels when they came in collision?

A. Yes, sir.

Q. What light was the Conemaugh showing you?

A. Showing me a green light.

Q. Masthead light and the green light were the only lights you saw?

A. Yes, sir, after she rounded the river, I saw her cabin lights.

Q. You saw at the same time only the red light of the New York?

120 A. That is all.

Q. So that just before the vessels came in collision they were showing to each other the red and the green lights? That is, the New York was showing her red light to the green light of the Conemaugh?

A. I should judge she was showing all three lights to the Conemaugh.

Q. But from your position you saw the green light of the Conemaugh and the red light of the New York?

A. Yes, sir.

Q. Do you know whether the New York made any change in her course after she passed the Ferguson, or as she was passing the Ferguson?

A. No, sir.

Q. How far was the Conemaugh from you when she exchanged whistles with the Burlington?

A. She was on the opposite side of the river from me, and a little above when they first exchanged whistles.

Q. How far was that away?

A. Probably half the width of the river.

Q. What would you say as to miles or parts of miles? Was she a mile away from you?

A. A quarter of a mile from me, I should judge. She was not a mile from me. Maybe a little more than a quarter. I cannot tell how much more.

Q. Was she half a mile more?

A. No.

Q. Between a quarter and a half?

A. Yes, sir.

Q. What lights on her did you see at the time she blew the whistles to the Burlington?

A. I saw his read and masthead light, his port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. You did not see both of the Conemaugh's lights at any time?

A. Yes, sir, right after the signal, I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile, I should judge, up the river.

Q. Was she a quarter of a mile up and over on the American side of the center of the channel? Is that it?

A. Yes, sir, somewhere along that side.

Q. You say that she blew the New York three separate signals of two blasts each?

121 A. Yes, sir.

Q. And during all that time she was astern of your barge or on the starboard side of you?

A. On the starboard side of me.

Q. As I understand you, it wasn't until she blew the alarm whistles that she got from under your stern?

A. She was passing across my stern.

Q. At the time she blew the alarm whistles?

A. Yes, sir, up the river and astern of me.

Q. About how far was she astern of you?

A. She was three or four lengths of herself, I should judge.

Q. How fast were you moving at that time?

A. We were moving a little better than two miles an hour. We were with the current, probably a little better than the current.

Q. You had steerageway, didn't you?

A. Yes, sir.

Q. How much faster is it necessary for you to go to have steerageway?

A. Not but a very little, quarter of a mile. Other boats might not need that much, for she is a boat that steers easy. Other boats might need more.

Q. What were you loaded with?

A. Lumber.

Q. What kind of lumber?

A. Dry white pine.

Q. How much of a deck-load did you have?

A. Ten feet of a deck-load.

Q. About your deck, or above your rail?

A. Above my deck.

Q. How high is it above your cabin?

A. About three feet.

Q. How many thousand feet of lumber did you have on?

A. I had on 335 or 340 thousand.

Q. What is your tonnage?

A. 212.

Q. How much side did you have out?

A. I had one foot about.

Q. How many spars on your vessel?

A. Two.

Q. Did you have any sails set?

A. No, sir.

Q. None of them up?

A. No, sir.

Q. Where was the wind from ?

A. There wasn't any.

122 Q. No air moving at all ?

A. Oh, there might have been a little. There was no wind to speak of. There might have been a little breath of air.

Q. Was the barges ahead of you carrying steering lights ?

A. Yes, sir.

Q. Do you know whether they were screened any ?

A. I think that two of them, and I don't know but all three of them were in boxes.

Q. You didn't carry any ?

A. Not usually I don't. I hung one up that night after we got the signal from the Conemaugh. I always carry a light down below already lit, so I can get it out at any time.

Q. Then you did get out a light—

A. Yes, sir, after he started to come across the river, I hung out a bright light.

Q. Where did you hang it ?

A. On a pole.

Q. How high did you hang it ?

A. About six feet.

Q. What kind of a light was that ?

A. A common lard-oil lamp; railroad lamp.

Q. Was the Amaranth nearer the Canadian bank as she rounded there than you were ?

A. I would not say to that. I don't think she was. If she was it was a very trifle.

Q. As I understand you, the New York passed you when you were about two points off the course up and down the river ?

A. Yes, sir.

Q. Just coming round ?

A. No, sir. I had put my wheel to port and thrown my stern around with the current to show him my red light; that was all.

Q. Had you your helm hard-a-port ?

A. Yes, sir.

Q. All the time ?

A. No, sir, only when I made her stern around to show him that light.

Q. Did you keep it hard-a-port from that time on ?

A. No, sir.

Q. Then you hadn't got to the turning point then ?

A. I hadn't got as far down as I wanted to go. We were all sagging down and I wanted to get clear down before I came around.

Q. What was the relative position of the Amaranth with
123 reference to you; had she turned as much as you or less ?

A. I think she had turned a little more.

Q. What was the length of your tow-line to the Amaranth ?

A. 500 feet.

Q. Where were you when you made all these observations of these vessels ?

A. I was standing on top of the deck-load.

Q. And she was loaded with a deck-load the whole length of her?

A. Yes, sir.

Q. The Conemaugh then was virtually following you, keeping astern of you and following you around?

A. She appeared to be.

Q. And in that way, it was you got the glimmer of her red light, in addition to her green light?

A. Yes, sir.

Q. It was shortly after the Burlington blew to the New York that the New York swung to starboard some?

A. Yes, sir.

Q. And she continued on substantially the same course until she got down to where you were or near to where you were?

A. I would not say as to that. She kept on coming up the river. Yes, sir, I might say she was substantially on that course.

Q. And you, at that time saw both of her lights and she seemed to be coming for you?

A. Yes, sir.

Q. And then you ported?

A. Ported.

Q. And swung two points and closed in the green light or shut out her green light?

Mr. GOULDER: That is not fair cross-examination. The witness has distinctly not said that he ported, and by his porting ran over to starboard and closed that light, the New York maintaining her course, but he distinctly said that he thought the New York at that time changed her course by porting, and it was that that shut in her green light. Now, this question assumes that the witness has said that he ported and he closed the green light.

Question withdrawn.

Q. At the time you ported how far was the New York from you?

A. She was a little below the Amaranth.

Q. Just about to pass the Amaranth?

124 A. Yes, sir.

Q. And then you saw both of the New York's lights?

A. Yes, sir.

Q. She was then heading clear of the Amaranth?

A. Yes, sir.

Q. And you thought pointing towards you?

A. Yes, sir.

Q. And then you ported?

A. Ported, yes, sir.

Q. And when you ported you saw both her lights?

A. When I first ported, yes, sir.

Q. And then you ported so as to swing two points?

A. About two points, yes, sir.

Q. And then you lost the New York's green light?

A. Shortly after that; not right at the instant.

Q. After you had got your full swing of two points, then you lost the green light of the New York, did you not?

A. Yes, sir.

Q. And only saw her red light?

A. Yes, sir.

Q. And from that time on you did not again see the New York's green light?

A. No, sir.

Q. But continued to see her red light only?

A. Yes, sir.

Q. And she passed you within fifty feet?

A. Fifty or a hundred.

Q. What you would call close?

A. Yes, sir, we call it close; a big boat passing us like that in the night.

Q. What interval was there, if any, between the last two blasts of the Conemaugh and the alarm whistles?

A. Very short.

Q. Can you give us any idea in seconds how long it was?

A. No, sir, I would not pretend to.

Q. Was the interval as short as was the interval between the alarm whistles and the collision?

A. Yes, sir, I would think it was; I would not be positive.

Q. And the collision followed almost immediately on the alarm whistle, didn't it?

A. Very shortly afterwards.

Q. So that the two blasts of the whistle, then almost immediately the alarm, and then almost immediately the collision?

A. A very short space of time.

125 Q. The time between the last two blasts of the Conemaugh and the collision was a short time?

A. Yes, sir.

Q. So short that there wasn't time to do anything to avoid the collision?

A. I would not say that; you can do a good deal in a short space of time sometimes.

Q. If there was time enough to avoid a collision, what do you think there was time enough to do to avoid it?

A. I could not say. I should think a man had time enough to roll his wheel over anyway.

Q. That is, from the time the last two blasts were blown until the collision occurred?

A. Yes, sir, he would have lots of time to do that.

Q. He would have time enough to put his wheel hard-a-starboard?

A. Yes, sir, either way; a little more than enough to do that, I should judge.

Q. Would you say it was a little more or a great deal more?

A. There wasn't a great deal of time in the whole business.

Q. Don't you think that about all a man could do would be to get his wheel over comfortably?

A. That makes some difference with wheels. I have seen some wheels you couldn't roll over in 20 minutes.

Q. Do you think there was time enough there to get a twenty-minute wheel over?

A. No.

Q. About how many minute wheel could you get over?

A. I could not tell you.

Q. Is it not a fact that you could count the interval in time in seconds only?

A. I would not say that.

Q. Did you think there was time enough to get a wheel over?

A. Any ordinary wheel there was, and more time. I could put my wheel over three or four times.

Q. Then yours is an extraordinary wheel?

A. Yes, sir, it is an extraordinary easy wheel to put over.

Q. About how far do you think you moved from the time the last three blasts were given and until the collision occurred, how many lengths of your vessel?

A. Oh, I might have moved one length, and I might have moved three; I don't know.

Q. Now, there is a good deal of difference between one and three.

126 A. I know it.

Q. Would you say it was as much as three?

A. I would not say.

Q. Was it as much as one?

A. I don't know.

Q. You can give us no idea?

A. I would not try to.

Q. Would you say it was as much as six?

A. No, sir, I would not fix it.

Q. Did you walk or move on your deck during that interval of time?

A. No, sir, I didn't.

Q. You stood at the wheel?

A. Yes, sir.

Q. Would you have time enough to have gone forward?

A. I don't know; I didn't try it.

Q. Haven't you any idea?

A. No, sir.

Q. Were you frightened so that you don't have any idea?

A. No, sir.

Q. Were you excited?

A. No, sir.

Q. You could not give us any time how far you could have gone from the time the two blasts were blown till the collision, the last two blasts?

A. No, sir, I had no thought of it at that time.

Q. You cannot put yourself in that place again and give us an idea?

A. I would not try to.

Q. That is not the question: You are here as a witness and you ought to give us the benefit of your judgment.

A. I have no way of telling it.

Q. You have no judgment on that subject?

A. I would not try to have any on that subject because I could not. If I had been watching any object ashore I might have told you.

Q. Can you tell us how far the Conemaugh ran after she blew the two blasts of her whistle last and the time she had the collision?

A. She went a little over her length I should judge; I would not put that positive.

Q. That is your best judgment of her?

A. Yes, sir.

Q. Did you see which side of the Conemaugh the New York struck?

127 A. Yes, sir.

Q. Which side was it?

A. On the starboard side.

Q. Could you see the vessel plainly from where you were?

A. I could see the outlines of them; yes, sir.

Q. And could you see enough of the bank so that you could judge that the Conemaugh was pretty close to the bank when she was struck?

A. I thought she was; yes, sir.

Redirect.

Mr. GOULDER:

Q. The New York, before you lost her green light there, in the neighborhood of the Araranth, was showing you, you have stated, all three of her lights?

A. Yes, sir.

Q. And had been showing them, for how long a time?

A. It was a short space of time. I would not say exactly. I would not put it into minutes.

Q. And how far in your best judgment, was she short of hitting the Amaranth, when you lost her green light?

A. From where I stood it looked to me she was fifty or sixty feet from her.

Q. And went past her that far?

A. Yes, sir.

Q. Now, what was it in your judgment, at the time, which made the New York miss the Amaranth for which you say she had been heading?

A. I thought he ported his wheel.

Q. The New York?

A. Yes, sir.

Q. And if he had not ported his wheel, what would he have done?

A. I thought he would have struck either one or the other of us.

Recross.

Mr. KREMER :

Q. You didn't see him swing ?

A. I didn't.

Q. And the fact that the light was shut out led you to believe that he must have ported ?

A. Not altogether. My porting my wheel did not throw her clear as I would come bodily straight down in the same course. I would not run across her at all.

Q. Do you know what the Amaranth did ?

A. No, sir.

128 Q. Where were you standing on your vessel when you ported ?

A. Standing aft on the deck-load.

Q. Which side ?

A. A little on the port side.

Q. Did you steady her after you swung two points ?

A. Yes, sir ; when the New York got abreast of her I starboarded my wheel and stood down the river again.

Q. You starboarded, did you ?

A. After the New York got up to me.

Q. What did you do that for ?

A. She would drift down*stairs* in the river until she fetched up on the tow-line.

Court: You were on top of your deck-load all the while ?

A. Yes, sir.

Mr. GOULDER : You say you had a foot of side out. I don't know as I understand exactly what you mean. How high was your deck above the water ?

A. One foot.

Q. Your deck-load, you stated, was ten feet above the deck or the rail ?

A. Above the deck.

Q. Making the top of your deck-load, how high above the water ?

A. 11 feet.

Q. Did you have any sail on ?

A. No, sir.

Q. Did any of your tow have sails on ?

A. No, sir.

Mr. KREMER :

Q. Did you have foresail ?

A. I had foresail and staysail, but no mainsail.

Q. Mr. GOULDER : They were furled ?

A. Yes, sir.

JAMES KELLY, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. You were the wheelsman of the Conemaugh at the time of this collision, were you?

A. Yes, sir.

Q. How long have you acted as wheelsman on steamers?

A. Three seasons.

129 Q. How long had you been on the Conemaugh in that capacity?

A. About two months.

Q. Now, do you remember any exchange of whistles between your boat and what proved to be the Burlington?

A. Yes, sir.

Q. At that time who was in the pilot-house?

A. The second mate.

Q. And yourself?

A. Yes.

Q. Your boat steered by hand or steam power?

A. She steered by hand.

Q. Was she an easy or hard vessel to handle the wheel?

A. Oh, she was a nice boat to handle. She steered all right.

Q. Up to the time of the signal with the whistle had you noticed the Burlington yourself?

A. No, sir; I was looking on the coak dock; I was steering down there on Smith's coak dock on those electric lights.

Q. Did you notice this clump of piles or any clump of piles with lights on them in the river?

A. No; I didn't notice them at all. I was watching the tow.

Q. Which boat blew first, your boat or the Burlington?

A. Well, the Burlington blew the first two blasts.

Q. Now, tell what was done on your boat when those two blasts sounded from the Burlington?

A. We answered them, and when the captain went to pull the whistle, I noticed he said, "Hard-a-starboard," and we swung around there, got pretty well around, and, of course, we took the wheel back a little so as not to let her swing too much around, and he says, "Steady."

Q. Do you know anything about your boat being checked or any engine signals given at any time between the Burlington's signal and the collision; if so, when was it?

A. Right after we got the tow around I noticed the checking bell—it is right in front of the pilot-house and I noticed them pulling a signal to check, as I thought, as he always does there in front of the pilot-house.

Q. Who put the helm hard-a-starboard when it was ordered?

A. Me and the second mate.

Q. How far did your boat swing before you got her stopped?

130 A. Well, she swung a little up the river, not much, but a little; a little more athwartships of the river.

Q. What was the next order that you received at the helm?

A. The next order, after we got around, after he checked her down, and we were pretty well around, he says, "Steady," and, of course, we had to pull the wheel back a little, and we got her steady, or just about had her steady and he says, "Port a little, follow that tow up." Of course that was the first time I knew there was a tow when he said tow.

Q. Under that order, port a little, follow the tow, what did you do, if anything, with your wheel?

A. Well, I gave her about half a turn to port, to let her come around easy.

Q. What was the next order that you got?

A. The next order was steady. We had got around, and we were slanting down the river.

Q. How much do you think you were slanting down from straight across the river when you steadied her at that time?

Mr. KREMER: After porting?

A. After we ported we steadied.

Q. I know, and you say you were slanting across the river; how much were you heading down from straight across?

A. I should say about two or three points.

Q. What was the next order that you got?

A. The next order at the wheel was, to hard-a-starboard.

Q. What was done with the wheel under that last order?

A. It was put over hard-a-starboard.

Q. How did you have your wheel when the boat was hit?

A. The wheel was hard over until she was sunk.

Q. Did you hear your boat blowing any passing signals, signals of the big whistle, after you replied to the Burlington's signal?

A. Yes, sir; I heard three whistles that we blowed and he blowed the alarm whistles.

Q. Three whistles?

A. Blow two whistles three times.

Q. Three signals of how many blasts each?

A. Two.

Q. Can you tell what you were doing, or in any manner describe when the first signal of two blasts were blown? I am now talking about those after you had replied to the Burlington.

131 A. We were going steady down the river when the first two blasts were blown, on a slant across the river.

Q. And how were you when the other signals of two blasts were blown?

A. We were on the same course; didn't get no order to change the course.

Q. Can you give us any judgment about how far below you the New York was at the time when you say the first signal of two blasts was blown?

A. I cannot say. I was not looking at the New York at all. I was watching the boat.

Q. Did you look down that way, and did you see the New York or her lights when your second signal was blown?

A. No, sir; I didn't look down that way at all. The first I saw of the New York was after the alarm signal and we put the wheel hard-a-starboard. After we got the wheel over I looked down and I saw the New York coming.

Q. When you did that, give us your best judgment of how far the New York was away from you then?

A. Well, she looked to be about two or three boat-lengths.

Q. Did you notice anything about her lights?

A. Of course I noticed her lights. I thought she was coming on a steady gait; I kept my eyes on her and shortly after she began swinging to port, and I heard aboard the New York I heard them hollering, "Hard-a-starboard."

Q. How long did it take you that night, when you got that last order hard-a-starboard to get your wheel over, in your best judgment?

A. Oh, somewhere about 10 or 15 seconds I should say.

Q. Did any one help you put it over?

A. The second mate.

Q. Which side of the wheel were you standing on?

A. I was standing on the port side.

Q. When you looked down and saw the New York after you had got your wheel hard-a-starboard the last time, did you notice anything of a barge near your boat?

A. No; I didn't notice that at all.

Q. Did you see any such thing as that between you and the New York, or closer to you than the New York?

A. No; I didn't notice the barge at all.

Q. You saw nothing of that kind there?

A. No, sir.

Q. And I understood you to say, correct me if I am wrong, that you had not before noticed the barges, or paid any attention to them?

A. No; I didn't pay any attention to them at all.

Q. Where was the captain during all this time?

A. He was right in front of the pilot-house, on the bridge.

Q. When you put your helm over the first time, before this checking signal what you have talked about, at what gait were you coming down the river; I mean whether it was your usual speed or checked speed; do you remember?

A. I don't remember whether it was checked or not.

Q. How did your vessel swing under that first hard-a-starboard helm?

A. She swung to port; she swung around lively.

Q. That is all.

Cross-examination.

Mr. KREMER:

Q. How long did you say you had been sailing?

A. Three seasons.

Q. On what kind of vessels?

15-277

A. Steamboats.

Q. When did you take the wheel at this time, that night?

A. 6.15.

Q. Was anybody helping you at the wheel, from that time on?

A. Generally. We have always the watchman there.

Q. Did you that night?

A. Not this watchman. We got a new watchman, took him from decking, and he seemed to be down below doing something else.

Q. When was it that the second mate came in to help you at the wheel?

A. Came in up here at Grosse Pointe. Coming down there it is kind of shallow and the wheel is hard to handle, and there was a deck hand there and he was helping me. I started kicking about him being in there and so the second mate came in.

Q. And then the deck hand went out?

A. The deck hand stayed in there for a while until the second mate sent him out. He says: You go down below for a while.

Q. And then from that time the second mate stayed and he stood there until a collision occurred?

A. No, sir; he stayed until we were getting in this here river up by Belle Isle, until we got down here abreast of Walkerville,
133 I should think, and then there was those ferry-boats and he came in awhile and stood by the wheel, and he was looking out the window in front — the pilot-house all the while.

Q. And he stood there until a collision occurred?

A. Yes, sir.

Q. After the exchange of signals between the Conemaugh and the Burlington, your first order was to hard-a-starboard?

A. Yes, sir.

Q. And the second mate helped you to put the wheel hard-a-starboard?

A. Yes, sir.

Q. How much do you think you swung under that hard-a-starboard helm?

Q. We swung right around; I thought a little up the river, if anything.

Q. Then you got the order to steady?

A. Yes, sir, that was given before she got around too much so that we could steady her.

Q. And then you steadied her, did you?

A. Yes, sir.

Q. And about how were you heading then?

A. At the time we got her steadied, I should say she was heading a little up the river.

Q. After you got her steadied you heard the checking whistles, you heard the captain check the boat, is that it?

A. Well, yes, sir, after we went around hard-a-starboard, when he went to blow these whistles to answer the Burlington, the captain said, Hard-a-starboard. After he got done blowing the whistles, he checked down; that is after we got going around on a steady helm.

Q. Then as I understand you, you didn't hear the engine whistle

until after you had got your wheel over and had the order to steady it?

A. Yes, sir.

Q. Then you ran along with your helm steady, and then did your boat blow any whistles to anybody else?

A. No, she didn't blow yet.

Q. Then the next thing you got was an order to port a little?

A. Yes, sir.

Q. Then did your boat blow?

A. No, she didn't blow yet.

Q. Then what next order did you get at the helm?

A. Port a little and follow the tow around.

Q. Did you port a little then?

A. Yes, sir.

134 Q. Did you then get an order to steady?

A. Why, yes, after she got around and got slanting across the river, he says, Steady.

Q. Then did you blow a whistle?

A. I think it was about that time he blew a whistle.

Q. Did you then see the barges?

A. No, I was not looking after the barges; I was looking across the river.

Q. Then it is a fact you did not see the barges at any time before the collision?

A. No, sir, I don't think I did see them.

Q. As I understand you, after you had ported and steadied, you were heading about two or three points off a course directly across the river?

A. Somewhere about that, yes, sir.

Q. Then you were angling across the river?

A. Yes, sir, on a kind of a slant across the river, a little down.

Q. Could you see the bank then?

A. I could see the bank, yes, sir.

Q. And you kept on that course until you got the order hard-a-starboard?

A. That is what I done.

Q. And then you put your helm hard-a-starboard?

A. That is what.

Q. And look out and for the first time discovered the New York?

A. Yes, sir.

Q. Now, where was the New York from you at that time?

A. Well, to the best of my judgment, about two or three boat-lengths, as I said before.

Q. How was she bearing on you?

A. Like she was coming straight for us.

Q. Could you tell whether she was bearing for ahead of you, or amidships, or astern of you?

A. No, she was heading right for us, right about the bow of us.

Q. Heading about your bow?

A. Yes, sir, that is what I thought.

Q. Did you swing any on your starboard helm?

A. Yes, sir.

Q. Could you tell us how much you swung?

A. We swung pretty near right against the bank.

Q. Can you tell us about how many points?

A. About five or six, I should judge.

Q. Was she going full speed at this time?

A. No, sir, I don't think she was.

135 Q. Was she going a pretty good gait?

A. About two or three miles an hour probably.

Q. Was she going faster than the current?

A. I don't know; she might have been going a little more.

Q. She was only going that fast—do you think she could swing six points in that short time?

A. Why, the current would swing her around itself, after she got swinging around. She was kind of angling down and after you give her wheel the current would take her too.

Q. Your engine was not stopped?

A. I don't know, I was not down there.

Q. Did you feel her moving ahead?

A. Yes, sir.

Q. You could?

A. Well, yes.

Q. Still you don't know whether your engine was stopped or not?

A. No, I don't, she might have been stopped for all I know.

Q. You could not tell up in the pilot-house whether the engine was in motion or not?

A. Well, you could certainly a little.

Q. You could a little. That don't say whether you don't know whether the engine was stopped or not?

A. I was not down there to look at it; you might have an idea it was in motion, of course, by the jar of the boat.

Q. What was your idea at that time, that it was in motion or not?

A. Oh, I thought it was in motion, of course.

Q. Now, if the New York had not swung to port, where do you think she would have struck you?

A. She would not have struck me at all. She would have struck the bank first.

Q. Would you have struck her?

A. No, I don't think it, not the way we were swinging around. We were bound up in the bank too.

Q. Both of you would have been on the bank you think?

A. That is what I think, yes, sir.

Q. Was your boat on the bank when she struck?

A. I think she might have been, yes. Very near it, if she wasn't. If the New York had kept off she would have been on the bank before the New York had got two or three or four boat-lengths; that is what I think.

Q. Suppose you hadn't hard-a-starboard-, how would you have passed the New York?

136 A. I don't think we would have passed her at all.

Q. What would you have done to her then ?

A. I think we would have knocked the stern off her.

Q. Which side of her stern ?

A. Starboard side.

Q. Starboard side ?

A. That is what I think, yes, sir.

Court then took a recess until 2.30 p. m.

FRIDAY, *February 26*, 1892—2.30 p. m.

JAMES KELLY, recalled for further cross-examination.

MR. KREMER :

Q. How far did your vessel run while you were putting your helm hard-a-starboard and until you struck, turning six points ?

A. After she got around ?

Q. No, after you had the order to hard-a-starboard until she was struck, how far did she run ?

A. I would not say that at all.

Q. Would she run a length ?

A. I don't know ; I would not say.

Q. Well, about how far ; two or three lengths ?

A. Oh, no, nothing like that.

Q. Not two or three lengths ?

A. I don't think so, no.

Q. Would she run a length ?

A. Well, I would not say how far she would run, but I know she would not run two or three lengths.

Q. Then it was less than two or three lengths she would run ?

A. Yes, sir.

Q. Don't you think it was less than one length ?

A. Well, I would not say.

Q. You can't say it was less than a length she would run ?

A. No, I would not say.

Q. She would run then a very short distance ?

A. Yes, sir, I think so.

Q. Did you put your wheel over quick ?

A. Yes, sir, put it over pretty quick.

Q. And just had time to look up and see the New York before the collision ?

A. Oh, I seen her coming before the collision.

Q. How far do you think your vessel run after you looked up and saw the New York until the collision ?

137 A. She didn't run very far.

Q. Did she run fifty feet ?

A. If I knew how fast she was going, I could tell you better ; I don't know how fast our boat was going.

Q. Suppose she was going six miles an hour while you were looking at the New York, how far would she run until the collision happened ?

A. She would not run a great ways.

Q. About how far?

A. Probably about a boat-length or half a length; something like that.

Q. Not over a boat-length and not less than half a length?

A. Something like that.

Q. Then it was a very short time?

A. I should say yes.

Q. Did you notice whether the New York was swinging?

A. Not when I first seen her, she was not swinging.

Q. She was swinging when she struck you?

A. Yes, sir, she was coming on a starboard helm when she struck us.

Q. Now, as you saw those boats there, what do you think was the cause of the collision? What brought about the collision? How did the boats happen to come together?

A. I should say it was through some sort of a mistake.

Q. Mistake by whom, on what vessel?

A. I should think the New York.

Q. Now, what mistake did she make?

A. Well, the New York was coming straight when I seen her, and if she had said hard-a-port—hard-a-starboard—she would have went on the bank, and we would have went on the bank, too.

Q. Then he made the mistake in ordering the helm hard-a-starboard?

A. That is what I think.

Q. That is all the mistake you could see?

A. That is all the mistake I know anything about because I didn't see the boats before that.

Q. What mistake did the captain of the Conemaugh make in connection with this affair?

A. I don't see that he made any.

Q. Suppose he had ported instead of starboarded?

A. That is where he would have made a mistake if he had done that.

Q. Then it was just right for him to cross the New York's bow?

138 A. He was not crossing the New York's bow; he was trying to get out of the road of the New York.

Q. Then the Conemaugh didn't make any mistake?

A. No, not as I could see. Of course she might have made a mistake, but I don't think it. That is what I would have done if I had been in the man's place.

Q. And all the mistake the New York made was putting her helm the wrong way?

A. I should judge when he got two lengths, yes.

WILLIAM BLACK, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. You are the chief engineer of the Conemaugh?

A. Yes, sir.

Q. Were you on watch in the engine-room at the time of your collision?

A. I was.

Q. (Producing book.) Is this your log?

A. Yes, sir.

Q. You may state what was the last signal you got to your engine before the collision.

A. A checking signal of three bells.

Q. At what time did you get that?

A. 7.44 p. m., October 21st.

Q. What time is that?

A. Buffalo standard time.

Q. What memorandum, if any, did you make of the time?

A. It was simply "Check at 7.45, and took the number of revolutions."

Q. Where did you put that memorandum first?

A. The first I put it on a slate and copied it in this book afterwards.

Q. Who transferred it from the slate to this book?

A. I did.

Q. Do you remember when you did that?

A. After the collision.

Q. The same night?

A. Yes, sir.

Q. And what time was that?

A. The next time I took was 7.50.

Q. What was the occasion of noting that time?

A. Stopping the engine.

Q. How long did you stop the engine after the collision occurred?

139 A. Well, I would not like to say positively.

Q. Well, your best idea of it?

A. Possibly a couple of minutes, more or less, less than that I should say.

Q. What is your best judgment of the time?

A. Well, possibly a minute and a half at the most.

Q. When you stopped your engine in what condition was your vessel then?

A. Well, she was filling with water; the fireman had run out of the fire-hold saying she was filling with water. The water was coming under the boilers. This was just afterwards.

Q. Under what sort of a check; about how many turns was your engine running during the time that she was checking?

A. I think about forty revolutions.

Q. And her regular full speed was how many turns per minute?

A. From 70 to 75.

Q. If you know about it you may state what is the effect upon a steamer like that, in putting the helm hard over and holding it so long enough to turn the boat at right angles?

A. It checks the speed of the engine, and I should say checks the speed of the boat likewise.

Cross-examination.

Mr. KREMER:

Q. What speed does your vessel make, or did she make, on that night, not considering the current, but the revolutions she was turning, when you received the order to check?

A. I should say about nine or nine and a half miles.

Q. Is that her full speed?

A. Well, no, her full speed is not much more than ten miles.

Q. How many revolutions will it take to give her ten miles, or a little over ten miles in still water?

A. 74 or 75.

Q. How many turns did she make at the time you received the order to check?

A. I cannot say positively, but my best judgment would be about 70 or 71.

Q. Then she was not running full speed?

A. She was not crowding.

Q. Why not?

140 A. For the reason that she don't run at her top speed only on occasions, when the fireman can get a full head of steam.

Q. Didn't she have a full head of steam at that time?

A. Not as high as she sometimes has.

Q. How do you know that now?

A. That is my recollection.

Q. Did you impress it upon your mind at that time that there wasn't a full head of steam?

A. No, sir; not particularly.

Q. How did you happen to remember that just at that hour that day, that season, you did not have a full head of steam?

A. Because it is only once in a while we do have a full head of steam. We seldom carry a full head of steam, running the rivers.

Q. Then the ordinary speed of that vessel is less than ten miles an hour?

A. Yes, sir.

Q. For instance, out in Lake Erie or in Lake St. Clair, before you come into Detroit river, what was your speed?

A. I don't think it was much more than eight miles.

Q. Had you checked down?

A. No, sir.

Q. What was it in Lake Huron on that trip?

A. I don't remember.

Q. How do you happen to remember it was eight miles on Lake St. Clair?

A. Because I don't think she makes more than that on any trip across Lake St. Clair.

Q. Then what is her ordinary speed across the lakes in still water?

A. Deep water?

Q. Yes, sir.

A. Possibly nine miles or a little more.

Q. Do you know how long it takes you to run from Buffalo to Detroit?

A. No, sir; not from memory, I don't.

Q. Can you tell from any memorandum you have?

A. No, sir; because it is a run we very seldom make.

Q. What is the run you usually make from Buffalo?

A. Buffalo to Erie.

Q. Can you tell the number of hours to make that?

A. I think it is from 19 to 20, something like that.

Q. What is the distance from Buffalo to Erie?

A. I don't know.

Q. What is your usual run from Chicago to Milwaukee?

A. From eight and a half to nine hours.

141 Q. Do you know the distance?

A. I have heard it called 86 miles, I am not certain.

Q. Are you quite positive it takes from 19 to 20 hours to run from Buffalo to Erie?

A. It is my best recollection, sometimes more, sometimes less.

Q. You don't know that distance?

A. No, sir.

Q. Now, when you get a signal of three whistles in your engine-room as a signal to you to what do you check your engine?

A. Somewhere to about 40 revolutions.

Q. What speed will that give her in the lake?

A. Possibly four miles and a half, more or less.

Q. It is about half speed, is it not?

A. No, more than half speed.

Q. Now, that night you got down here to about full speed, did you not?

A. Yes, sir.

Q. And that would be about four miles and a half an hour?

A. Yes, sir.

Q. And the current added to that would be her correct speed?

A. Yes, sir, provided she was running with the current.

Q. How many minutes was it, as you now recollect it, between the time you got the signal to check and the time the collision occurred?

A. As near as I can recollect, six or seven minutes.

Q. You checked her at 7.44?

A. Yes, sir.

Q. And you stopped her at 7.50?

A. Yes, sir.

Q. That is six minutes, is it not?

A. Yes, sir.

Q. Now, you didn't stop her until a minute or a minute and a half after the collision, did you?

A. It wasn't more than a minute and a half; it was less than a minute and a half.

Q. And that made it less than five minutes between the time you got the order to check and the time the collision occurred, is that a fact?

A. Yes, sir, that would make it.

Q. Now, in that time would your speed be reduced from full speed that you were running, or from the speed you were running with your engine and turning up the full number of revolutions to the speed that she would get to the reduced number of revolutions?

142 A. I don't understand your question.

Q. Would she reach her gait in the time she had, between the time you got the checking bell and the time the collision occurred? Would she get down to four and a half miles an hour?

A. I think so.

Q. Would she have time enough to do it?

A. Yes, sir.

Q. You think between four and five minutes she could get down to her checking gait?

A. I think so under the circumstances.

Q. What circumstances have you reference to when you say she would do it under the circumstances?

A. I have reference to the boat having swung around and the action of the rudder on the boat.

Q. Those were the only circumstances?

A. Yes, sir.

Q. Would she come down to her gait faster or slower in running with the current?

A. To which gait do you mean?

Q. To her reduced gait; would she get the quicker by running with the current?

A. I should say she would get it quicker by running against the current.

Redirect.

Mr. GOULDER:

Q. During the time from your checking at 7.44 until your boat was struck was there any variation in the speed of the engine?

A. I believe there was.

Q. What was it?

A. It was simply from the motion of the rudder.

Q. Did you do anything with it?

A. No, sir.

Q. Did you make any change?

A. No, sir.

Q. In the time?

A. No, sir, I didn't.

Q. Do you know from any means how quick you took the bank after you were struck, or when with reference to being struck?

A. No, sir.

Q. You have no knowledge on that subject?

A. No, sir.

Recross.

Mr. KREMER :

Q. Did you check the boat yourself?

143 A. Yes, sir.

Q. Where did you go then?

A. I stood there a few minutes looking out of the gangway, and stepped back in the engine-room and stood there.

Q. What did you go to the gangway for?

A. To take a look around.

Q. Which gangway did you go to?

A. Starboard.

Q. Why did you go to the starboard gangway?

A. Because it was the nearest gangway. It was the gangway that we usually go to because it is the door we mostly keep open on that side.

Q. Why did you go to the gangway?

A. To see what was going on.

Q. What caused you to want to know what was going on at that time?

A. For the reason that I heard whistles blown, passing whistles, signals.

Q. On what boat?

A. The Conemaugh.

Q. That was after you checked?

A. I would not be positive whether it was after or not.

Q. Did you hear it more than once?

A. Yes, sir.

Q. Wasn't it the alarm whistle just before the collision that brought you out?

A. No, sir.

Q. They didn't move you, did they, they didn't bring you out to the gangway?

A. I was out before they blowed.

Q. Just before they blowed?

A. Well, I don't recollect just how soon I went out after I heard the passing signals repeated the second time.

Q. Was that the last signal that you heard before the alarm signals?

A. Yes, sir.

Q. Where did you go after you looked around?

A. Into the engine-room.

Q. What did you see when you looked around?

A. I saw lights of several boats in the river.

Q. Did you see the barges?

A. I suppose it was the barges; I didn't pay any further attention to them.

Q. Where were you when the alarm whistles were blown?

A. I think I was in the engine-room, to the best of my recollection.

144 Q. Were you not at the gangway then?

A. No, sir.

Q. How long did you stay at the gangway when you went there?

A. Possibly about ten or twenty seconds.

(By Mr. GOULDER:)

Q. This memorandum in your log of 7.44 indicates, as I take it, the time when you checked your engine?

A. Yes, sir.

ROBERT SMITH, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. SHAW:

Q. You were master of the Wesley last season, were you?

A. Yes, sir.

Q. Were you on deck on her the night of the collision between the Conemaugh and the New York?

A. I was.

Q. Where were you when you first saw the Conemaugh that evening?

A. We were just below the Smith coal dock when I first saw her.

Q. Where was the Conemaugh at that time?

A. Well, I could not tell you just where she was. I should think she was very nearly a mile from us or a little over.

Q. What light were you showing her at that time?

A. We must have been showing our green light, because we were heading on the shore kind of.

Q. Did you hear the signal between the Burlington and the Conemaugh?

A. I did.

Q. What was that signal?

A. Two whistles.

Q. Did you notice where the Conemaugh went then?

A. I didn't notice right away; when I looked back I saw her going across the river.

Q. When you first saw her what lights of the Conemaugh did you see?

A. When I first saw her I saw three lights, red, green and head light.

Q. When you next saw her going across the river, what lights did you see?

A. I saw her green light.

Q. State whether or not you saw any headlight.

145 A. I think I saw the headlight and the green light.

Q. You were looking at her at the time she came into collision, off and on, were you?

A. Yes, sir.

Q. State whether or not you lost that green light at any time before the collision.

A. Well, I could not say that for certain whether I did or not.

Q. As you came down there and rounded to, how far were you

from the Canadian shore, just before you started to round to, under a port helm?

A. I should think we were about one-third from the Canadian shore.

Q. Now, we will go back a little: When you were over astern of the Burlington, did you hear any signals from the Conemaugh as she was going across?

A. Yes, sir.

Q. What signals did she blow?

A. I heard her blow two whistles.

Q. More than once?

A. Two or three times.

Q. Can you state how many times now?

A. I think it was three times, but I would not be sure. Twice that I am certain of.

Q. Did you understand what she was blowing at at that time?

A. I saw this fellow coming up, and I supposed he was blowing at her.

Q. When she blew the first whistle to the boat going up, which we will call the New York, how far was the New York from you—when the Conemaugh blew her first signal to the New York?

A. I should think she must have been over half a mile or three-quarters of a mile below the tow.

Q. That was when the Conemaugh blew the first signal after starting to go across the river?

A. Yes, sir.

Q. What part of the river was the New York in at that time, do you remember?

A. I think he was—he must have been over near the middle of the river.

Q. Can you remember what lights she showed at that time?

A. I saw her red light.

Q. As the New York passed by the end of your tow, where was the last barge in that tow, as to being above or below where you were, or abreast?

A. I think she was a little below, or I was.

146 Q. What would you say as to the speed of the New York at that time?

A. Well, I don't know how fast them boats run, but I should think she was going nine or ten miles an hour; the way it looked to me.

Q. How far above the stern barge in your tow, the Ferguson, did the collision appear to you to take place?

A. Well, I should think it must have been pretty near a thousand feet; the way it looked to me from where I was. Of course I didn't measure it, but that is what I should judge.

Q. During this time what was your boat doing, going ahead, standing still, or dropping down?

A. Just about standing still. He was just holding us that way.

Q. Did you hear any engine whistles on the New York?

A. I did not.

Q. Where were you in relation to the coal dock; just explain where your boat was lying.

A. I was a little below the lower end of the dock.

Q. How far out in the stream?

A. I was not out very far, about 200 or 300 feet.

Q. What is the length of your tow-line?

A. About 600 feet I had out.

Q. State whether or not you met a steamer just before you rounded to, bound up the river.

A. I did not.

Q. Did you meet any besides these two about that time?

A. No, sir, I did not.

Q. How was the night?

A. It was a dark night, clear though.

Q. Any stars?

A. Yes, sir, there were stars out.

Cross-examination.

Mr. KREMER:

Q. The first light you saw on the New York was the red light, wasn't it?

A. No, sir.

Q. What was the first colored light you saw?

A. I saw the red and green when I first saw her—which boat do you mean?

Q. The New York.

A. I saw both lights.

Q. That was before the Conemaugh whistled?

A. Yes, sir.

Q. You heard the New York whistle?

147 A. Yes, sir, I heard her whistle.

Q. That is, an exchange of whistles with the Burlington?

A. Yes, sir.

Q. And the signal was what?

A. One whistle.

Q. And then you saw both her lights?

A. Yes, sir.

Q. And then right after that she showed you only a red light?

A. Not right away. We started to round to; the steamboat had followed and I followed him around.

Q. And then you opened up the red light and closed the green?

A. When I looked again I saw the red light.

Q. Then you didn't see any other colored light of hers but the red light up to the time of the collision?

A. I don't think I did.

Q. You saw her red light only at the time that the Conemaugh whistled for the Burlington?

A. When the Conemaugh whistled for the Burlington.

Q. You were then seeing only the red light of the New York?

A. I could not say that. I don't remember when she blowed for

her. I think it was—well, I don't know ; it was somewhere about that time when she whistled or a little before.

Q. When the Conemaugh—where was your barge at the time the Conemaugh whistled to the Burlington ? Had you straightened up the river ?

A. I was heading on the dock a little.

Q. That was when the Conemaugh whistled ?

A. When the Burlington whistled to the Conemaugh.

Q. Did the Conemaugh answer that whistle ?

A. Yes, sir.

Q. At that time you were heading pretty near straight up the river ?

A. Yes, sir ; I was heading kind of on the dock. Still not on the dock ; I hadn't got way around yet.

Q. How far away from the dock were you at that time ?

A. Oh, I must have been two or three hundred feet.

Q. When you saw the Conemaugh first where was she in the river ?

A. Well, I should think she was very near the middle of the river.

Q. Showing you both her lights ?

A. Yes, sir.

148 Q. Where with reference to where the Wesley was, did the collision take place ?

A. I was up above her.

Q. About how much above, a point directly abreast or across the river from where the Wesley was at the time ?

A. Well, I could not tell that exactly, but it was quite a little above it.

Q. At that time, the Ferguson hadn't come around to cross the river, had she ?

A. At the time of the collision ?

Q. Yes, sir.

A. No.

Q. She was still heading down, wasn't she ?

A. I could not say whether she had started to swing around or not.

Q. Had the Ferguson got abreast of where you were ?

A. I think she was just a little below me.

Q. How much ?

A. Well, I could not tell exactly, but I think she was just a little past me.

Q. Where did this collision occur with reference to Smith's coal dock ?

A. Well, it was very near across from the coal dock, a little above it.

Q. Was it abreast of where the Burlington was lying ?

A. Well, I could not tell you. It wasn't abreast of where I was lying, and my tow-line was 600 feet long. Of course I was further down than he was.

Q. Was it above a point abreast of the Burlington ?

A. I think it was.

Q. Not very much though, was it?

A. I could not tell you that.

Q. You could not tell that?

A. Not without I was there.

Q. How far did it occur from where the Amaranth was?

A. Well, it must have been quite a ways from where the Amaranth was I should think.

Q. You could not tell that, either?

A. Not exactly. It was somewhere around 1,500 feet, the way it looked to me.

Q. When did you first make up your mind that it was just a thousand feet from where the Ferguson was to the place of the collision?

A. Well, I had that in mind all the time.

Q. When did you first hear anybody say that?

A. I don't know as I heard anybody say it particularly.

149 Q. Do you mean to say you haven't heard anybody say since this occurrence that it was just a thousand feet from the Ferguson to where this collision happened?

A. I think I heard it here.

Q. Didn't you hear it the next day after the collision?

A. I did not.

Q. Did you hear it for the first time after you came to Detroit this time?

A. Yes, sir.

Q. That was the first time you heard it?

A. Yes, sir; I didn't hear anybody say anything about a thousand feet.

Q. Haven't you talked about this collision at all?

A. Yes, sir, I did a little.

Q. And in that talk wasn't it mentioned that it was a thousand feet from the Ferguson to where the collision occurred?

A. No, sir, no one said anything about a thousand feet to me.

Q. Did you ever hear any one say anything about it?

A. I heard somebody say it here; I don't know who.

Q. Are you a brother of the captain of the Ferguson?

A. No, sir, I am no relation to him.

Q. Where did you first hear that you were one-third of the way across as you came along the Canadian side there?

A. That was my own judgment.

Q. Hadn't you ever heard of it before you came here?

A. No, sir, I never talked about that.

Q. When you gave a statement a day or two after this collision, didn't you state then you were one-third of the way across the river?

A. I might have, I won't be sure.

Q. And haven't you since heard or had read to you the statement you made at that time?

A. No, sir, I never did.

Q. Has anybody said anything to you at all about it?

A. I talked with Mr. Shaw, but not much of anything.

Q. And it was then that the matter was gone into again and you discovered that it was one-third of the way?

A. No, sir; no, sir; nothing was said—

Mr. GOULDER: Wait a moment. I object to that. That is a question, your honor, that is unworthy to go into this record. This witness is disinterested in this matter. We have a right to assume he is here trying to tell the truth and that puts the imputation upon him that in a conversation with Mr. Shaw preliminary to giving his evidence he discovered a material fact which he swears to
150 as of his own knowledge. I don't believe we ought to have that order and that kind and character of cross-examination. Objection overruled.

Q. How far was the Wesley away from the Ferguson when this collision occurred?

A. Well, I could not tell you that.

Q. How far was the Conemaugh away from the Wesley when the collision occurred?

A. Well I cannot tell you; she was well across the river; I can tell you that much.

Q. Then you are not able to tell me how far the collision occurred from the Canadian bank; you are not able to tell me how far the collision occurred from the Amaranth; you are not able to tell me how far the collision occurred from Smith's coal dock; you are not able to tell me how far the collision occurred from the Burlington; or how far the collision occurred from the Wesley, but you are able to tell me it occurred a thousand feet from the Ferguson. Is that so?

A. I don't understand it that way.

Q. Now, wasn't it a thousand feet, or haven't you testified that it was a thousand feet?

A. I did.

Q. Now, why is it you know that so positively and so well and so accurately and don't know any of these other distances?

A. I am guessing at it. I cannot tell you exactly how far it is.

Q. But this is not a guess; you stated positively it was a thousand feet.

A. I told you it was my judgment.

Q. Will you say that is correct?

A. I would not have said it if I did not think it was.

Q. Is it, or is it not?

A. It is to my best knowledge, I didn't measure it.

Mr. SHAW: Before you started to round to there, will you state whether or not there was sufficient room between you and the Canadian shore for large vessels to meet and pass with safety, in your judgment?

Mr. KREMER: We object to that. If he was one-third of the distance over, it seems to me it is unnecessary to go any further.

COURT: It is a question of the water surface or the extent of the

channel; if the witness was acquainted with it; the difference between the shore line and the channel bank. I will permit the question to be asked.

A. Yes, sir. When I passed by there I think there was
151 lots of room for boats to pass.

Q. That is for boats to meet and pass?

A. Yes, sir; for boats to meet and pass.

FRED M. ERRILL, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. SHAW:

Q. You were on the barge Ferguson, were you not, at her wheel on the night of the collision opposite Smith's coal dock last fall, between the Conemaugh and the New York?

A. Yes, sir.

Q. When did you first see the Conemaugh that night?

A. I didn't notice her until he blowed two whistles to her and when she answered it.

Q. Where was she then?

A. She was coming down on the American side.

Q. Where was your boat at that time?

A. We were about rounding to from the Canadian side.

Q. About how many lengths of your boat would you say you were off from the Canadian shore at that time? At the time you saw the Conemaugh?

A. Oh, six or seven lengths.

Q. State whether you were any closer than that at any time, up to the time of the collision.

A. No, sir.

Q. After this signal with the Conemaugh, what did the Conemaugh do?

A. She started to cross the river.

Q. Did you hear any signals from her?

A. I heard her answer the Burlington two whistles.

Q. Did you hear any other signals?

A. No, sir.

Q. How near did the Conemaugh come to your stern at any time?

A. Well, the closest she was I think was about four lengths of herself.

Q. How far, Mr. Merrill, in your judgment, if you have formed any judgment on it, was the point of the collision from your boat?

A. About four lengths of herself.

Q. When did you first see the New York?

A. When she was right off our quarter.

Q. Did the deck-load prevent you from looking down the river?

152 A. Yes, sir.

Q. Did you notice how fast the New York was going, or how fast did she appear to be going when you first saw her?

A. I don't know how fast exactly, but she was going at a pretty good rate.

Q. About how fast, can you give us any idea?

A. I don't know as I can tell.

Q. Was she going faster or slower than the Conemaugh was?

A. She was going faster.

Q. How much faster do you think?

A. About twice as fast I should judge.

Q. How was she heading when she came up on your quarter and you saw her first?

A. She was heading right off towards the Canadian shore.

Q. How near, if you noticed, were the two boats to the Canadian shore when they came together? That is, the Conemaugh and the New York?

A. Well, I don't know how near they were; I was paying particular notice of our own boat about that time.

Cross-examination.

Mr. KREMER:

Q. The New York passed you close by?

A. Yes, sir.

Q. Within 50 feet?

A. Somewheres around there.

Q. What you call close?

A. Yes, sir.

Q. And you saw her plainly as she passed you?

A. Yes, sir.

Q. At that time you were heading straight up and down the river or across the river?

A. We started to swing then. I had orders to put the wheel apart.

Q. Had she got abreast of you when you got the order to hard-a-port?

A. No, I got the order before I seen the New York.

Q. The deck-load was higher than your boat, wasn't it?

A. Yes, sir.

Q. And you could not see the New York until you could see her from your port quarter?

A. Yes, sir.

Q. Had she lapped the Ferguson when you saw her the first time, had she come abreast of the Ferguson?

A. Yes, sir.

153 Q. Was the Conemaugh following you any?

A. I think she was, yes, sir.

Q. Following you?

A. Yes, sir.

Q. She didn't get out on your port side until after you saw the New York, did she?

A. I think she was towards the bank about that time I saw the New York.

Q. Was she heading on to the bank ?

A. Yes, sir.

Q. Was she heading right straight on the bank ?

A. No, she was slanting kind of down.

Q. Was she slanting more on the bank than the New York was ?

A. I don't know, they were both heading on the bank.

Q. Can you tell which one was most headed on the bank ?

A. I think the New York was most heading on the bank, because I think the Conemaugh was closer to the bank.

Q. Did you notice how far away from your bow the New York passed ?

A. No, sir.

Q. That is when you noticed the distance, when she passed by your side ?

A. Yes, sir.

Q. You didn't see her as she passed the Amaranth ?

A. No, sir.

Q. At that time when she passed you, she was heading on the Canadian bank ?

A. Yes, sir, she was heading that way.

Q. (Placing models.) Here is the New York, and here you are, now place the New York as she was passing you ?

A. I think she was about down that way.

Q. Then she was pretty near on a parallel course with you at the time she passed you ?

A. Yes, sir.

Q. She was heading up and you were heading down, angling across the river ?

A. Yes, sir, this way. (Placing models.)

Q. How much, as you have placed your barge, how many points are you now to starboard of the straight course down the river ?

A. I don't know anything about points.

Q. You don't know how many points your barge swung under the port helm ?

A. No, sir.

154 Q. You don't know how much the New York swung after she passed by your stern ?

A. No, sir, I didn't notice.

Q. Now, just tell me about what shape the Conemaugh was coming as you saw her under your stern ?

A. About that way. (Placing models.)

Q. When the New York then was abreast of your barge where she now is, the Conemaugh was about in this position ?

A. Yes, sir.

(The positions of the boats are marked on the face of the chart.)

Q. Then, as I understand you, that was the position of the New York and the Conemaugh at the time the New York was passing by the Ferguson ?

A. Yes, sir.

Q. And the distance as you have it now between the New York and the Ferguson is intended to be fifty feet?

A. Well, I don't know.

Q. Is it more or less than that?

A. I don't know how far it was exactly.

Q. You have said it was close, and you thought about fifty feet?

A. Yes, sir.

Q. Do you know whether from those positions either one of the vessels changed her course, either the New York or the Cone-maugh?

A. I don't know, I would not say.

Q. But you do know that was the position at that time?

A. Yes, sir, somewhere about there.

By the COURT:

Q. Did you see the collision?

A. Yes, sir.

Q. How far did it occur from the Ferguson?

A. I don't know exactly how far, three or four or five lengths of our boat I should think.

Q. Which way from you?

A. Right off our stern.

Q. On either side?

A. On the Canadian side.

By Mr. KREMER:

Q. Was it abreast of the Ferguson or over her quarter or over her stern?

A. Over her stern.

Q. Was it directly astern of her, or to one side?

A. I should think it was a little on the Canada side.

By Mr. SHAW:

155 Q. When your boat is loaded there is a hollow place in the middle for the wheelsman to look through, in looking at the light ahead?

A. No, sir; there was none on it.

Q. Could you not see the light on the boat ahead of you?

A. Yes, sir.

Q. Wasn't there a small opening or trough left there so you could see through and see that light?

A. No, sir.

FRANK DAVIDSON, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. SHAW:

Q. You were at the wheel of the Wesley, I believe at the time of this collision?

A. Yes, sir.

Q. Did you notice the Conemaugh when she was signaled by the Burlington?

A. Yes, sir.

Q. What was the signal exchanged at that time?

A. Two blasts.

Q. Where were you?

A. I was at the wheel.

Q. Where was your boat?

A. I think we were heading up the stream about 400 feet from the dock.

Q. Down below the dock?

A. Yes, sir; the lower end of it.

Q. Down below the lower end of Smith's dock?

A. Yes, sir.

Q. Did you notice where the Conemaugh went to after she signaled?

A. No, sir.

Q. When did you see her again?

A. At the time of the collision.

Q. Did you notice her going over there at any time?

A. No, sir.

Q. Did you hear any signal from her?

A. Yes, sir; I heard her blow whistles, but I could not state what they were.

Q. Did you see anything of the New York?

A. Yes, sir.

Q. When did you first see the New York?

A. When she was about three-quarters of a mile from us.

156 Q. Did you watch her when she came up the river?

A. No, sir.

Q. When did you next notice her?

A. Well, I think it was about five minutes after, or a little less, probably.

Q. Where was she then?

A. She looked to be heading right about the middle of the tow.

Q. Was she near to the tow, or far from it?

A. I could not state. She looked to be quite a ways off.

Q. She was coming up towards the tow at that time, was she?

A. Yes, sir.

Q. Did you notice any change in her course at that time?

A. No, sir.

Q. What light could you see?

A. I could see the three lights, colored lights and masthead light.

Q. That was when she was down further?

A. Yes, sir.

Q. Did you notice her again after that? You say you saw her the second time; did you watch her from then on?

A. No, sir; I saw her when they came together, though.

Q. Did you notice the speed she was going at the time of the collision?

A. I noticed she was going pretty rapidly.

Q. From where your boat was, looking across the river, will you state whether the tail end of the tow was above or below you at the time of the collision?

A. Above us.

Q. Where was the collision?

A. In regard to the Ferguson?

Q. Yes.

A. She was astern of the Ferguson. The collision was astern of the Ferguson.

Q. About how far do you think?

A. I could not state exactly; the best of my judgment it would be about 800 feet or so.

Q. Did you notice the Canadian shore just before you rounded to, and notice how far you were from the shore?

A. Yes, sir.

Q. About what part of the river was there between you and the Canadian shore?

A. I should think about one third of it.

Q. How far were you from the Canadian bank at the time of the collision?

157 A. About three hundred feet.

Q. Did you just about the time you rounded to there, or at any time while you were rounding to, meet any other steamer besides the New York and the Conemaugh?

A. No, sir, not that I can remember now.

Cross-examination.

By Mr. KREMER:

Q. How old are you?

A. I will be 17 in June.

Q. How long have you sailed?

A. Since July until the first of December.

Q. What have you been sailing on?

A. The G. W. Wesley.

Q. What has been your work?

A. Seaman.

Q. You say that you were 300 feet from the American bank at some time?

A. When we were rounding to, when we were heading up the river.

Q. You were about 300 feet from the bank, that is the shore you can see?

A. From the dock.

Q. 300 feet out?

A. Yes, sir.

Q. Which way were you heading then, up or down the river?

A. We were heading up the river.

Q. Straight up the river?

A. No, sir, not exactly.

- Q. Heading on to the dock some?
 A. A little bit, yes, sir.
 Q. At that time the Ferguson was heading which way?
 A. She was heading downstream, I should think.
 Q. And she was across the river from where you were?
 A. Yes, sir.
 Q. You could not tell across that river just how far she was from the bank, could you?
 A. No, sir.
 Q. All you can say is that when you went along there it was about one-third of the distance across?
 A. Yes, sir.
 Q. You could not tell either with any degree of certainty how far the collision occurred from where the Ferguson was?
 A. No, sir, but that is my judgment.
 Q. About 800 feet?
 A. Yes, sir.
 158 Q. It might have been more or it might have been less?
 A. Yes, sir.
 Q. Did you hear the crash of the collision?
 A. I did.
 Q. Did the New York at any time shut out her green light to you?
 A. I was not noticing her particularly.
 Q. When you last saw her she was showing both lights to you?
 A. No, not the last time I saw her. The last time I saw her she was in the collision.
 Q. Was she showing any light to you then?
 A. The masthead light I could see.
 Q. That is all?
 A. Yes, sir.
 Q. Did you watch her from the time you first saw her both lights until the collision?
 A. No, sir, I didn't.
 Q. When you first saw her, what attracted your attention to her?
 A. Nothing in particular.
 Q. What did you see of her then?
 A. I saw her lights.
 Q. Did you watch her then any?
 A. No, sir.
 Q. Didn't pay any attention to her after that?
 A. Well, no, sir.

JOHN A. HOGAN, after being sworn on behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

- Q. You are the second mate of the Conemaugh, I believe?
 A. Yes, sir.
 Q. How long have you sailed on the lakes?
 A. Twelve seasons last season.

Q. How long as a licensed officer?

A. Four.

Q. How long have you been second mate of the Conemaugh?

A. The second trip I was on her she sunk.

Q. What kind of vessels had you been officer of before?

A. Propellers and barges.

Q. In what part of the vessel were you at the time of the collision?

159 A. In the wheel-house, at the wheel on the starboard side.

Q. How long had you been in there; where was your vessel when you went in?

A. I first went in up at the light-ship at Grosse Pointe.

Q. And remained in how long?

A. Until we got in the river, at Windmill point.

Q. You may state when you went in again.

A. I came out to the bridge and I stayed out until we got down to somewhere around Walkerville distillery; I went in there.

Q. Who was in the pilot-house when you went in?

A. The wheelsman and one deck hand.

Q. What became of the deck hand?

A. He stayed there a while; then I told him he could go below a while.

Q. Who was doing the steering?

A. The wheelsman.

Q. What did you do?

A. I gave him a hand to roll her over whenever he had to roll her over. I stood by. I didn't have a-hold of the wheel.

Q. While you were standing by, as you say, whereabouts were you standing?

A. On the starboard side of the wheel.

Q. She had windows in the front of her pilot-house?

A. Yes, sir.

Q. How were those windows as to being open or closed?

A. They were open, the one right forward of us, looking out.

Q. How many windows were there?

A. Three, I think.

Q. Which one or ones were open?

A. The one in front of me on the other side, in front of the wheelsman.

Q. As you came down the Detroit river and down past the River Rouge, did you see anything of the piles where the wreck of the Kasota had been?

A. Yes, sir.

Q. And on which side did you leave them?

A. Left them on our port hand.

Q. How close, if you know, did you go in passing?

A. I should say a couple of hundred feet. I gave them a good wide berth.

Q. At that time, as you came down towards them, do you remember any prominent object for which you were heading?

160 A. Yes, sir, we were steering pretty near just to clear Smith's coal-dock lights.

Q. Having that how?

A. It was on our starboard bow.

Q. Did you hear any signalling between your vessel and the propeller down there, which proved to be the Burlington?

A. Yes, sir.

Q. What was the first signal blown by either of them?

A. The Burlington blew two whistles.

Q. Had you seen the Burlington up to that time, anything of her yourself?

A. No, sir, that was the first I saw of her.

Q. When that signalling of two blasts was heard from the Burlington, what occurred on your vessel?

A. Well, the captain walked over, or he took a step, he was amidships, and he sung out, Hard-a-starboard, as he was stepping over. We put the wheel hard over and he blew two whistles.

Q. How promptly after the Burlington blew her whistle was this answer from your boat?

A. Almost immediately after; as soon as he got the whistle he stepped right over.

Q. Was anything done at that time on your boat?

A. As soon as he got through pulling the signal whistles he went and checked her.

Q. What was the signal which he then gave?

A. Three small whistles.

Q. Engine whistles?

A. Yes, sir.

Q. Did you do anything then about the wheel on that order being given to hard-a-starboard?

A. Yes, sir, I helped put it over as much as I could.

Q. How promptly, you may state, was the wheel put over?

A. We put it over just as fast as we could.

Q. What was the effect on your vessel, how much did she swing?

A. She came right around fast.

Q. What was the next order?

A. The next order was to steady.

Q. When she had got steadied under that order, how much had she come around?

A. Well, the time we got her steady she was heading a little up the river, if anything, from right across.

Q. Between that time and the time of the collision, did or did you not know of some signal given with your big whistle on your boat?

161 A. Yes, sir.

Q. And between that time and the collision, were there or were there not orders given to the wheel and executed?

A. Yes, sir.

Q. After you had swung around and steadied her, headed her a

little up if anything from directly across, what was the next thing that occurred?

A. He said to port and follow her back. He asked us if we had seen the stern of that tow, and I said I did, and the wheelsman said he seen something, he ported some anyway.

Q. Did you at that time assist at the helm?

A. I don't believe I did.

Q. Did you testify to an order to port?

A. Yes; he said port and follow that tow back. The captain said that.

Q. Now, Mr. Hogan, how much did your vessel port, in your best judgment, we will say from the heading directly across the stream?

A. Well, I should say somewhere between three or four points.

Q. What was the first signal given with your big whistle after you had exchanged with the Burlington and starboarded?

A. The next signal was two whistles.

Q. When was that given with reference to any of those manœuvres with the wheel that you have spoken of?

A. I believe just after we came around.

Q. After you came around how?

A. On the starboard wheel.

Q. And as your recollection goes was that signal given before or after the order to port a little and follow the tow around?

A. It was given before.

Q. Do you remember looking down the river and seeing what that signal was blown to at that time?

A. No, sir; I don't believe I did. I didn't pay much attention to that whistle.

Q. What was the next signal, if there was any other, with your big whistle?

A. The next was two more.

Q. Was that given before or after you ported, as you recollect?

A. I think it was before.

Q. Was there any answer to your first signal of two blasts?

A. No, sir; not that I heard.

162 Q. When that signal was repeated, as you now state, did you then look down to see what you were signalling to?

A. Yes, sir.

Q. What did you see?

A. I saw a propeller down the river below this tow.

Q. What signal lights was that propeller exhibiting to you?

A. I saw them all.

Q. You mean by that, what?

A. Two colored lights and a headlight.

Q. Was there any answer to that second whistle of two blasts?

A. Not that I heard.

Q. Was there any other signal given after that?

A. Yes, sir.

Q. What was the next?

A. Two more.

Q. Given by whom?

A. By Captain Miller.

Q. By your boat?

A. Yes, sir.

Q. And at that time did you look and see the New York?

A. Yes, sir.

Q. What lights did you see then?

A. Well, I seen the red light then.

Q. How about the green?

A. I did not see her green light.

Q. You did not see the green?

A. No, sir.

Q. Was there any other signalling with your big whistle, and if so, what?

A. Yes, sir; there was three or four or five short toots.

Q. What do you call that signal?

A. It is a sort of an alarm.

Q. During this time from the time you ported and came as you say between three and four points downstream from across was there any change made in your course up to the blowing of the alarm signals?

A. Yes, sir; steady there.

Q. Well, that didn't change your course, to steady your wheel?

A. No, sir.

Q. What was the next order you got to the wheel after that last steady you speak of?

A. Well, when he didn't answer the last whistle he steadied.

Q. Now, I want to know what was the next order to your wheel after your steadying?

A. The next order was to starboard, after steadying.

Q. What was the order and what did you do?

A. I put the wheel hard-a-starboard. The captain said put it hard over.

Q. What was the order?

A. To put the wheel hard-a-starboard.

Q. What did you do?

A. I put it over.

Q. Did you help do it?

A. Yes, sir; that was after the alarm whistle was given.

Q. How long after the alarm whistle?

A. Well, very shortly.

Q. When you looked out and saw the New York the second time your signals of two blasts was given you saw all three of her lights, as you have stated. Whereabouts was the New York then as it appeared to you?

A. Well, I think she was pretty well in the middle of the river then.

Q. And how far distant from you in your best judgment?

A. Oh, I don't know, a mile or so, I don't know, not any more.

Q. At the time when your third signal of two blasts was given you looked out and saw the red light, whereabouts was the New

York then? You can give it in distance from your vessel in lengths, or with reference to the tow, if you can tell about the tow?

A. Well, she was somewhere around the third barge.

Q. Somewhere around the third barge?

A. Yes, sir.

Q. At the time of the danger signal were you looking down that way?

A. Yes, sir.

Q. Whereabouts was the New York then?

A. Well, she was coming up on the last one; somewhere abreast of the last barge.

Q. How far down below you in the river was the tail of that tow in your best judgment?

A. Oh, she was probably a boat-length or a boat and a half; probably 300 feet.

Q. Did you get your helm hard over, hard-a-starboard?

A. Yes, sir.

Q. Did you look out after you had got it hard over?

A. Yes, sir.

Q. And where was the New York then?

A. Well, she was down the river a little ways from us.

164 Q. How much, what is your impression about it?

A. I guess about a couple of boat-lengths.

Q. At the time you looked out, after your helm was hard-a-starboarded, at the time we are talking about, did you notice her colored lights at all?

A. Yes, sir; I saw her red light.

Q. Did you notice any time after that and before she struck you, anything about her colored lights?

A. Well, before she struck us I saw both the lights; she seemed to be coming around on a starboard wheel. I could see both lights just before she struck us.

Q. How much would you say your vessel swung under that final hard-a-starboarding?

A. Probably a point and a half or two points, probably somewhere about that.

Q. When you looked over there and saw the tow, as you were coming over on that diagonal course, could you, or could you not see any space of water between the tail of the tow and the Canadian bank?

A. Yes, sir; I could see quite a space. It looked to me to be lots of room to go down.

Q. From all the opportunity you had, and from all the observations you made that evening, at any and all times, what do you say was the distance of the tail of that tow out from the Canadian shore? You can express it in boat-lengths, or giving the proportion of the river, or in feet, the best way you can give us your idea of it.

A. Probably two and a half boat-lengths or three, somewhere about that.

Q. Lengths of what boat?

A. Well, the boat I was on.

Q. That would be lengths of the Conemaugh?

A. Yes.

Q. And when you were over there about the time the alarm whistle was given, at the time you got the order to starboard, how far down below you in the river did the tail of that tow appear to be?

A. Oh, probably 300 feet.

Q. Did you hear any answer from the New York to any signal that night?

A. No, sir.

Q. When the New York struck you, have you any idea how far you were from the bank?

A. Well, we were not very far. I don't know. I expected to fetch up on the bank before she struck us.

Q. What do you say about whether she did fetch up on the bank before you were struck?

A. I don't think she did.

165 Q. How near did you get to it?

A. Well, we were not over half the length of ourselves away from the bank.

Cross-examination.

By Mr. WISNER:

Q. What is your age?

A. 30 years.

Q. Your eyesight pretty good?

A. I always supposed so; I think it is.

Q. The atmosphere was so clear that night that you could see five or six lengths of the Conemaugh without any trouble?

A. Well, I don't know how far you could see. It was a nice clear night.

Q. Could you see the hulls of the vessel as far as that?

A. No, sir; I don't think we could.

Q. Within three or four lengths of the Conemaugh?

A. Well, I don't know. I don't hardly think we could see the hulls then. You might distinguish them.

Q. Just see a dark substance?

A. You might; I don't know.

Q. Three or four lengths of the Conemaugh would be 750 feet?

A. Yes, sir; I think we could distinguish outlines.

Q. Did you remain on board the Conemaugh after the collision until daylight the next day?

A. Yes, sir.

Q. And when you came out at daylight the next day, how far were you from the shore, from dry land?

A. Something over 200 feet. I don't know. Something over that I guess.

Q. And you were where you struck the night before?

A. I don't know whether she drifted any after she struck or not.

She probably drifted some before she sunk. She was about where she settled on the bottom.

Q. You found out the channel bank was somewhere about 200 feet from the shore line, didn't you?

A. Yes, sir.

Q. And was the Cone-maugh laying across the stream in the morning when you came out?

A. No, sir; she was not laying across the stream; she had swung around with her head up.

Q. Now, Mr. Hogan, when you put your helm hard-a-starboard, just after answering the Burlington's whistle, you saw the Cone-maugh swing around so that she was headed above, across the stream?

A. She was a little at the time we got her steadied.

166 Q. You were in the pilot-house on the starboard side of the wheel, and the window was open on the pilot-house?

A. Yes, sir.

Q. Did you look for the purpose of ascertaining what the Cone-maugh had been allowed to swing so far for?

A. No, sir.

Q. That didn't excite your curiosity at all?

A. Well, we had to give her a good deal of wheel to steady her, and I didn't get time to look out.

Q. My question was, did you look out?

A. No, sir.

Q. She swung then something above across the stream, and you received an order to steady her?

A. Yes, sir.

Q. Up to the time you received that order, was your helm hard over?

A. She was not hard over, she eased back a little, probably a spoke or two. She probably got away a spoke or two.

Q. Because she was moving so fast on the swing?

A. Yes, sir.

Q. The wheel was pulling pretty heavy on you, was it?

A. The boat was moving pretty fast through the water?

A. Yes, sir.

Q. And at the time your wheel was put hard-a-starboard you think you were about the middle of the stream?

A. No, not the time the wheel was put over.

Q. You were pretty near the middle of the stream, were you not, within 100 feet or so of it?

A. Well, I don't know as we were that. We were then well over to the American side.

Q. When you starboarded and got around on that course, and steadied, how did you steady, where did she head?

A. She headed rather up the river.

Q. After she was steadied?

A. Yes, after we got her steadied.

Q. After you got her steadied you realized she was heading up the river, athwartships of the stream?

A. Yes, sir.

Q. Didn't that excite your curiosity to look and see what you had swung that far for, didn't you try to satisfy yourself what the object of swinging the Conemaugh downstream, way around heading a little above athwartships of the stream; didn't you think it strange?

A. No, sir.

Q. Didn't think anything about it at all?

167 A. I didn't have time, because by the time we got her steadied he was blowing whistles; he blowed one whistle, and by the time we got her steadied he blowed another.

Q. And that prevented you looking out?

A. Yes, sir.

Q. You could not look out that open window while the whistles were being blown, is that what you mean?

A. I could look out forward.

Q. Didn't you?

A. Just after heading up the river.

Q. She was heading above across the river?

A. Well, above.

Q. Did you look out?

A. Yes, I looked ahead.

Q. Did you look to see what was ahead?

A. I could not see anything there.

Q. There was nothing ahead of you?

A. No, sir.

Q. How much could you look on your starboard bow?

A. Oh, probably a point or so.

Q. What did you see on your starboard bow?

A. Well, I don't know; I guess I saw the tail end of the tow, probably then.

Q. I want to know if you did see it?

A. I don't remember of seeing it.

Q. You had blown one whistle, one blast of two whistles, and got no reply; you blew another whistle and got no reply; you looked out then and saw a steamer down the river showing you both her side lights, is that so?

A. Yes, sir.

Q. How did she bear from you?

A. Well, she was probably a little abaft of being abreast of us. We were probably a little further over the river than she was; pretty near abreast of us.

Q. She was pretty near abreast of you, or abeam of you?

A. She was a little aft of us.

Q. You were a little nearer the Canadian side of the river than she was?

A. Yes, sir.

Q. That is the way it looked to you, didn't it?

A. Yes, sir.

Q. And at that time you were heading a little above, directly across the stream?

A. Yes, sir.

Q. So that she would appear to you in about that relative position, wouldn't she, something like that?

A. Yes, sir.

168 Q. Now, how did you see her, from where did you look?

A. I looked out of the forward window, put my head out of the forward window. I looked around down the river.

Q. Could not see her out of the side window?

A. I could if I looked, but I didn't look that way.

Q. You think you put your head out of the forward window?

A. Yes, sir.

Q. And looked around to the right?

A. Yes, sir.

Q. Then you blew another whistle of two blasts on the Conemaugh, is that right?

A. Yes, followed by two more.

Q. That is the third one. You looked out again?

A. Yes, sir.

Q. And you saw the New York showing you her red light only?

A. Yes, sir.

Q. When you looked the first time, which was between the first and second blasts, did you see the barges of the tow between you and the New York?

A. I didn't look until the second blast. I didn't look between the two. He blew the second blast before I looked out.

Q. The first time you looked out was after the second blast?

A. Yes, sir.

Q. And when you looked out between the second and third blasts, did you see between you these barges? (Placing barges.)

A. Yes, sir, I saw the barges, but they were not in that position.

Q. How were they?

(Witness places models.)

Q. Don't forget you have testified twice that you saw both side lights of the New York at that time, when you first looked out to see the New York?

A. Oh, she was over here in the middle of the river, somewhere near the second barge.

Q. Now, that was after the second blast was blown, the two whistles by the Conemaugh?

A. Yes, sir.

Q. You looked out of the forward window of the pilot-house, looked downstream and saw the two side lights of the New York?

A. That was at the time of the second blast.

Q. Between the second and third blasts, which was after the second blast was blown?

169 A. It was when he was blowing it. I heard him blowing and I looked out to see what he was blowing at.

Q. Then it was after he had blown the two whistles?

A. It was while he was blowing ; he was pulling the bell cord.

Q. Why did you look out ?

A. I wanted to see what he was blowing to, I didn't get any answer.

Q. You didn't get any answer to what ?

A. To the first whistle.

Q. Was it that which caused you to look out when you blew the second whistle ?

A. Yes, sir.

Q. Now, he blew the first whistle, he got no answer, and he blew the second whistle and you looked out ?

A. Yes, sir.

Q. When you looked out did you see the barges of these tows ?

A. Yes, sir.

Q. And were they about in the relative position that you have put them on the chart ?

A. He must have been over this way a little further. He was somewhere between the first and second barge.

Q. And the other barge—

A. Extended across the river.

Q. From there the New York's course seemed to be ?

A. Yes, sir.

Q. If she had continued to run straight ahead when showing you both of her lights, she would have run through the tow, wouldn't she ?

A. Yes, sir.

Q. Now, there was no answer to that second blast, and the third blast was blown ?

A. Yes, sir.

Q. And this was before you got the order to port and follow them around ?

No answer.

Q. Well, I don't care for your answer.

Mr. GOULDER: If that is a question let us have an answer.

Mr. WISNER: The first, second and third blast of two whistles each were blown before you got the order to port and follow them down ?

A. I said we ported after the second blast.

Q. Did you say you ported after the second blast ?

A. Yes, sir.

Q. And before the third blast ?

A. I don't know as we were porting then.

170 Q. Witness, you may put it either way you like, only I want you to answer the question.

A. I don't understand your question.

Q. When did you get the order to port ? I will read your language: "The captain said, Do you see the stern of that tow ; I said I did, and the wheelsman said something, and the captain then said, Port and follow them." You heard that conversation ?

A. Yes, sir.

Q. Was that before or after you blew the third blast of the two whistles?

A. It was before.

Q. Did you port and follow them when the captain told you to?

A. Yes, sir.

Q. How much did your boat swing under that port?

A. Somewheres between three to four points.

Q. How would you be heading with reference to athwartships of the stream then; how many points downstream?

A. Oh, probably about three points.

Q. Just about as she is now? (Referring to models.)

A. I don't understand the paper here.

Q. The paper represents the stream.

A. (Placing models.) Heading about that position.

Q. She is heading now about three points down?

A. Somewheres about that.

Q. When you had reached that position did you receive the order to steady, or did you steady without any order?

A. No, sir, we got the order to steady.

Q. Did you steady her?

A. The wheelsman steadied her; I was not handling the wheel. She was steadied. I saw her steadied.

Q. Then you looked out and saw the red light of the steamboat below, is that right?

A. Yes, sir.

Q. Put her where you think she was then, will you?

(Witness places models.)

Q. Could you then see between the tail end of the tow and the Canadian shore?

A. Yes, sir.

Q. Right down through?

A. Well, not directly down the river. I don't know as I could then.

Q. The Conemaugh had not gotten under the stern of the rear barge at that time?

A. No, sir.

Q. And it was before the Conemaugh got to the stern of the rear barge that she blew the third blast of two whistles?

A. Yes, sir.

Q. And the boats were then in about the position below as you have placed them?

A. Yes, sir.

Q. With the New York between the second and third barges from the tail end of the tow?

A. Yes, sir.

Q. Showing you her masthead and red light?

A. Yes, sir.

Q. Could you tell how she was heading?

A. Well, by the lights she was showing she was heading over towards the Canadian shore.

Q. Could you tell any other way than by the lights she was showing?

A. No, sir.

Q. Then she was heading in such a way as to show you her port light, and that is all you know about it?

A. Yes, sir.

Q. You then blew the third blast of two whistles?

A. That was when she was about where she is now.

Q. Then the Conemaugh stood on under a steady helm, did she?

A. Yes, sir, for a little while.

Q. And crossed the line of the tail of the tow?

A. No, sir, that was when she was in this position, I should judge. (Placing models.)

Q. Now, when they were in that position, you blew the alarm signal?

A. No, sir, that is the position they were in when he blew the last two whistles.

Q. Standing down with a steady helm?

A. Yes, sir.

Q. And continued to stand with a steady helm for a short time and blew an alarm signal?

A. Yes, sir.

Q. And when you blew the alarm you had cut the line of the tow, had you, so you could look down the port side of the last barge?

A. Yes, sir, but we were not as close to the tow as that though.

Q. When you blew the alarm, then you had cut the course of the tail end of the tow and could look down the port side?

A. Yes, sir.

Q. You saw the red light of the New York?

A. Yes, sir.

172 Q. And you could see the distance between the New York and the tail end of the tow?

A. Oh, I could see they were pretty well off, but I could not make out the distance. At the time of the alarm she was coming probably by the stern barge somewhere.

Q. At the time the alarm was blown the Conemaugh had passed the line of the rear barge's course, and the New York was about abreast of the stern barge?

A. Yes, sir.

Q. You blew the alarm and put your helm hard-a-starboard?

A. Yes, sir.

Q. And you swung about a point and a half, you think, before she struck?

A. Didn't swing as much as that.

Q. How much did you swing?

A. (Placing models.) That is the position she was in when she struck.

Q. You didn't strike—you didn't swing at all under that hard-a-starboard, did you?

A. Yes, sir, she swung some.

Q. A point?

A. Probably that.

Q. About a point?

A. Yes, sir, from that to a point and a half.

Q. She didn't swing six points?

A. No, sir, she didn't swing any more than a point and a half, somewheres in that neighborhood.

Q. And that is the relative position of the boats when they came together, in your judgment?

A. Yes, sir.

Q. She struck right abreast of the barge?

A. Yes, sir, something like that.

Q. She struck you at an angle of seven points, you think, seven points on the starboard bow.

A. Yes, sir, pretty near, call it that.

Q. Did you remain in the pilot-house until she struck you?

A. Yes, sir.

Q. Mr. Hogan, what brought about the collision, what caused it?

A. I don't know.

Q. Can't you tell us?

A. They got into one another's way; that is all I can say.

Q. And that is your opinion about the collision?

A. They came together. I don't know what caused it.

Q. How long have you sailed?

A. 12 seasons.

Q. How long as an officer?

173 A. Four.

Q. Have you had your papers four seasons as second mate?

A. Yes, sir.

Q. What have you served on those four seasons?

A. I was two seasons on a propeller, Buffalo, and one season in the Scranton, with the exception I left her in the middle of the season.

Q. When those two boats came together, I think you have testified, you thought the tail of the tow was about 300 feet below you?

A. Somewheres in that neighborhood, yes, sir.

Redirect.

Mr. GOULDER:

Q. When the New York came around the stern of the last barge, if she had had her helm starboard then, and came around there on a swing to starboard, where would she have gone?

A. If she had come around the stern barge she would have went clear, certainly. There was lots of room to go clear, but she didn't appear to come around that way; she went around over towards the Canada shore.

Q. My question is, suppose that after passing the stern barge she had not first gone over towards the Canadian shore and then turned, but had turned up here by the barge then where would she have gone?

A. She would have went clear then.

Q. And you would have passed each other how?

A. Starboard to.

Q. And you say there was plenty of room for that to have been done if she had turned at that point?

A. I think so.

Q. How far, can you give us any idea, below the tow did the New York turn from the position in which she was showing you both of her lights to this course she took over here which brought her to the Canadian shore under your bow? How far below when she made that change, shut out her green light from you and took this course that brought her over into the Canadian shore?

A. She appeared to be very close, I could not say just how much.

Q. To which barge? Heading apparently—before he made that change, heading apparently for what barge?

A. Heading on the third barge in the tow.

Q. That is the one we have called the Amaranth here?

A. Yes, sir.

Q. You said you were unable to tell just what the distance was between the New York and the last barge in the tow when she came past her?

A. He appeared to be very close there when he was passing.

Q. Could you see down between them, between the New York and that barge as she came along there?

A. No, sir, I could not, because they were heading in such a direction; I could not see from where I was.

Q. What do you say about the room here between the last barge in the tow and the Canadian shore, as to whether there was room for those boats to navigate, if they had been properly handled?

A. I certainly think there was room enough for them to pass.

Q. And about the room that was between you as you came along here and this stern barge, what do you say about their being room there for a propeller to navigate in safety between you and that barge?

A. Yes, sir, there was. The barge was pretty well off us.

Q. To your starboard?

A. Yes, sir.

Q. Now your answer, Mr. Wisner, that you didn't know what it was that caused that collision. Aren't you too modest in saying that?

A. I didn't form any opinion of it.

Q. That was the difficulty. His question asked you to form an opinion, and the trouble is you did not before answering that question, form any opinion. Now, if there was plenty of room between this stern barge and the Canadian shore for the two boats to navigate, and plenty of room between your starboard side and the barge for the New York, and if, as you say, she would have had plenty of room if she had starboarded and come around the end of that tow, but she came over here on the Canadian side before swinging under a starboard helm. Think those things over and tell the court why she didn't clear?

Mr. WISNER: I object to the called-for testimony as not competent. It does not call for competent testimony. His hypothesis is not founded upon facts as testified to by his own witnesses.

Objection overruled.

A. There was room enough to come around. They could have come around between us and that second schooner. I think there was plenty of room.

Q. Then why didn't she go clear?

A. Because he didn't come around in time enough.

175 Q. Because the New York didn't come around in time enough?

A. Yes, sir.

Q. Suppose the New York, when you saw her down here, after you had blown your second signal you saw her coming down there apparently heading for the Amaranth. Suppose the New York had stopped down there and kept that course, and had not flirted over here and shut out her green light, what do you say then about whether there would have been any trouble or not?

A. I don't think there would have been any trouble, checked down and stopped her.

Mr. WISNER: I object to that as incompetent. If there is any duty upon the New York under the circumstances to stop down there, it might be pertinent.

Court: You don't claim that there was that time any duty on either boat to stop with reference to the other?

Mr. GOULDER: I claim this: That it was the duty of the New York to hold her course that she was on when she was down there showing both her lights to us; or if she saw fit in her navigation to depart from that course, to do it at her own risk. She took her own choice.

Court: I see nothing that obligated the New York to stop below that tow. I don't think it was incumbent upon her to stop at that time, as regards the Conemaugh.

SATURDAY, *Feb'y* 22, 1892—10 a. m.

JOHN HOGAN, recalled for further cross-examination.

By Mr. WISNER:

Q. Just before the Conemaugh blew two whistles to the Burlington that night you heard her whistle blow once, didn't you?

A. No, sir, not that I remember.

Q. You don't remember of hearing the Conemaugh's whistle blow once that night in that locality?

A. No, sir.

Q. Are you positive about that?

A. Yes, sir, I am positive, I don't remember anything more than two whistles.

Q. Haven't you made statements that she blew one whistle that night of the collision just before she blew two?

A. No, sir.

Q. Now, you say to Mr. Goulder there was room enough between the tail-end barge of that tow and the New York, when the
176 New York came by her, for the New York to have starboarded and run in close under her stern, closer than she did? You stated that, did you?

A. Yes, sir.

Q. How far from that barge, in your judgment, did the New York pass?

A. Passed up around the stern, or do you mean when she was going across the river?

Q. Passed around the stern.

A. Well, she passed from three to four boat-lengths of the Conemaugh, that is, after she came up the river.

Q. Just think of that again and tell me once more how far the New York passed from that stern barge?

A. Just after she comes around there a little?

Q. (Placing models.) The stern barge is in its proper place. Tell me how far she passed, please, from that stern barge? You may take the model and place it wherever your good judgment thinks it was. The stern barge was heading downstream, wasn't she?

A. Well, she was heading more over.

Q. We will make her head more over then. Make her head any way you like. Now, show us how the New York came up?

A. She came up in that direction. (Moving models.)

Q. Now, right there, how far was she in your judgment from that stern barge?

A. Well, she could not have been more than 100 or 200 feet anyway. Somewhere in that vicinity. She was very close.

Q. She was very close to that rear barge?

A. Yes, sir.

Q. Now, you say she could have sooner have starboarded and run under the stern of that barge and cleared the Conemaugh. What do you mean by that?

A. I don't think she got her wheel over hard-a-starboard when she did come around.

Q. Where do you think she ought to have put her wheel over?

A. When she came to his quarter she could have come around that way, under the starboard wheel.

Q. He could have starboarded or started his starboard helm when on the quarter or beam or abreast of that stern barge?

A. When he was on the quarter.

Q. And that would have given her a swing to port around the stern of the barge?

A. Yes, sir.

Q. Now, she was on a swing to port when she struck you?

177 A. Yes, sir.

Q. And she struck you about 300 feet above that stern barge?

A. Above, yes, but this stern barge was away out in the river.

Q. The stern barge was away out in the river?

A. Yes, sir, we were in here, nearer the shore.

Q. Can you get the boats in that position without putting the helm of the New York hard-a-port and swinging her around over and then putting it hard-a-starboard and swinging back again?

A. No.

Q. Where were the boats when they came together, I mean the Conemaugh and the New York. Where were they with reference to these boats now?

A. (Placing models.) In that position.

Q. Now, the distance between the stern of the New York and the last barge of the tow is less than one hundred feet, you say, the lateral distance?

A. I am a little mixed on these boats. The New York was above the tow.

Q. Do you think you have reached it now as you want it?

A. Yes, sir.

Q. Now, that is the location of the boats at the time of the collision as near as you can place them?

A. Yes, sir.

Q. And the distance from the collision to the steam barge of that tow is about 300 feet, as you say, or you have said it two or three times?

A. What I said was that we were 300 feet above, not right above, up this way.

Q. When the collision took place?

A. I mean to say this boat was out in the river, she left a good space to go up here, but she was out from the bank here. That was the 300 feet I had reference to. It was the 300 feet we were above the tow, about.

Q. The Conemaugh was 300 feet above the tow when the New York struck her?

A. Yes, sir, above, but not in distance.

Q. And the New York came up within 100 feet of that barge?

A. Somewheres in that neighborhood.

Q. And she was swinging under a starboard helm when she struck you?

A. Yes, sir.

178 Redirect.

Mr. GOULDER:

Q. Have you any idea how far this tow was, the last of the tow, below the New York when the New York struck you?

A. I have, she was pretty well astern of the New York.

Q. Pretty well astern of the New York at that time?

A. Yes, sir, she was more than what the model shows.

Q. Put it down as it looked to you?

A. I should say she was anyway two boat-lengths past the barge.

Q. That the New York was two boat-lengths at least past the last barge when the New York struck you?

A. Yes, sir.

Q. And the barge well out in the stream from the place where the New York hit you?

Recross.

Mr. WISNER:

Q. What boat do you refer to when you say two boat-lengths?

A. The Conemaugh.

Q. The Conemaugh is 250 feet long, isn't she?

A. Yes, sir, somewhere about that.

Q. And you say the stern barge of the tow was at the time of the collision two of those boat-lengths from the Conemaugh at the time of the collision, do you say that, or from the New York?

A. Below the New York.

Q. You have then stated four times she was 300 feet from the Conemaugh—

Mr. GOULDER: No, he has not stated that. He has especially corrected you.

A. I said 300 feet down the river, but this time when we put our wheel starboard that she was 300 feet down the river, but still she was out in the river; I do not mean to say she was 300 feet from the Conemaugh.

Q. Whom do you mean by she?

A. This stern barge.

Q. What distance do you mean to testify when you say she was 300 feet below you?

A. This barge was 300 feet below us when we put our wheel starboard.

Q. Where was the New York then?

A. She was somewhere near abreast of that barge.

Q. Abreast of that barge and 300 feet below you?

A. Yes, sir.

179 Q. And within 100 feet of her?

A. Yes, sir.

Q. You put your helm hard-a-starboard, then swung a point or a point and a half at the very most, the New York came up with her helm hard-a-starboard, swinging to port and struck you?

A. I don't know as it was hard-a-starboard, but she was swinging very fast when she came where I could see her.

Q. She was swinging as though her helm was hard-a-starboard?

A. Yes, sir, when she got close enough for me to see her.

FRED MAY, after being duly sworn in behalf of the libellant, testified as follows:

Examined by Mr. GOULDER:

Q. At the time of the collision between the New York and the Conemaugh, you were on what vessel?

A. On the Conemaugh.

Q. In what capacity?

A. Watchman.

Q. At the time of the collision or a little while before that where were you on your boat?

A. I was standing on the starboard side.

Q. And in what part of the length of your boat?

A. Pretty near half way.

Q. That would be well amidships on the starboard side?

A. Yes, sir.

Q. As you came down there you may state whether you heard any exchange of whistles or not between a vessel and what we call now call the Burlington?

A. Yes, sir.

Q. At that time can you tell us what part of the river you were going in, as to being in what part of the river?

A. He was in the middle of the river; I could not tell how much on either side.

Q. There has been spoken of here a clump of piles with a light on them, did you see any such thing that night?

A. I didn't.

Q. What was that signal from the Burlington?

A. Two blasts of the whistle.

Q. When you heard that you may state what you heard and saw on board of your own vessel.

180 A. Well, I heard two big whistles, and shortly after that or right after that I heard check whistles.

Q. And what did your vessel do?

A. Well, she appeared to be swinging downstream, and she did.

Q. Swinging downstream?

A. Well, swinging some towards the Canadian shore.

Q. As you went along after that, and until the collision, can you tell the court what the general direction of your vessel appeared to you to be?

A. I can, yes, sir.

Q. What was it?

A. She appeared to be heading, slanting down the stream.

Q. Before the collision, when this exchange with the Burlington and the collision, you may state whether you heard any other signals of the big whistle on your vessel, and if so, what were they?

A. I did, yes, sir.

Q. What were those signals you heard?

A. I heard three whistles starboard side, two blasts each, and then I heard several whistles.

Q. Alarm whistles?

A. Yes, sir.

Q. At the time of your blowing any of those whistles of two blasts, did you notice or see the propeller, which we call the New York?

A. I did see that after the first time we blew a whistle, and I saw the New York down below the tow in mid-stream.

Q. Did you at any time notice the colored lights of the New York?

A. I didn't.

Q. As you went over there, at any time before the collision, did you notice the tail of this tow?

A. I did.

Q. At the time of the alarm whistle, as it appeared to you, was he nearer the Canadian shore, the tail of the tow or the vessel you were on?

A. I think the Conemaugh was a little bit nearer the American shore.

Q. In your best judgment and estimate, how far below you in the stream was the tail of the tow at that time, or about that time?

A. Well, it might have been two or four lengths of the Conemaugh.

Q. Between the tail of that tow and the Canadian shore what space was there?

A. I guess pretty near four lengths, of the Conemaugh,
181 that is what I mean.

Q. Did you at that time see the New York, and notice her so you can tell us anything about where she was at the time of the alarm signal?

A. Yes, sir, she was some place between the last barges.

Q. Somewhere along in there?

A. Yes, sir.

Q. As she came up from that point to the collision, did you notice so that you are able to tell us whether she came straight along, or whether she turned either way?

A. I don't think I am, no.

Q. That is, you don't think you are able to say it?

A. I don't.

Q. At the time you were struck, which was nearer to the Canadian shore, you or the tail of the tow?

A. Well, I think we were.

Q. From the place that you stood on the vessel, starboard side, amidships, are you able or not to tell how close you were to the Canadian shore at that time?

A. I don't think we were a great distance.

Q. Are you able to tell exactly what that distance was?

A. No, I ain't.

Q. Do you remember of anybody else standing on your boat near where you were?

A. I do. I saw a person standing up a little nearer forward than I was.

Q. Do you remember who that was?

A. I found out afterwards it was Mr. Crowe.

Q. One of the deck hands on your vessel?

A. Yes, sir.

Cross-examination.

By Mr. WISNER:

Q. Mr. May, it was a very short interval of time between your alarm whistles and the collision?

A. It wasn't long. I could not tell you exactly how long it was. It was a short time.

Q. A very short time?

A. No, I would not say a very short time, but just a short time.

Q. What do you mean by a short time? I want to get your idea of a short time, as you call it.

A. Somewhere between a half a minute and a minute. It may have been less than that.

Q. It may have been less than half a minute?

A. Yes, or more than a minute, a little.

Q. Did you ever with a watch or clock count the time?

182 A. A short time?

Q. Yes, sir.

A. I don't think I did, no. I can tell about a minute, though, without having a watch.

Q. Now, you commence when I tell you, and tell me when it is a minute. Now: When you think it is a minute from that time, you let me know.

A. (Witness waits.) There.

Q. Just 11 seconds, a trifle more than a sixth of a minute. Now, what interval of time do you think it was between the alarm and the collision?

A. Well, it was longer than that.

Q. How much longer than that?

A. About twice as long. Maybe a little more. I would not say for certain.

Q. Your idea is that it was a very short space of time. And when you blew that alarm whistle you saw that stern barge and this tow right abeam of you?

A. I don't know anything about abeam.

Q. Well, right abreast of you?

A. That means right straight?

Q. You were standing here (indicating on model) and you saw this barge just about in front of you, if you stood here?

A. No, she was a little more over that way.

Q. At the time of the alarm she was more towards your stern?

A. More towards the Canadian shore; that is, the Conemaugh than she was at the time she passed astern of us.

Q. You mean to say the Conemaugh had passed across the line of the barge before she blew the alarm?

A. No, I didn't mean to say that.

Q. Then she didn't pass it before she blew the alarm?

A. She might have been a little one way or the other, she was about abreast of it.

Q. And did you take in the situation so as to be able to give the court the number of lengths between the Conemaugh and the stern barge when that alarm was blown?

A. No; not exactly.

Q. The barge was pretty close to you?

A. A good, comfortable distance away.

Q. How far away was she?

A. A distance of two anyway.

Q. 900 or 1,000 feet, you think?

A. Between 500 and 800 feet.

Q. And at that time you were on that barge boiler about four lengths of the Conemaugh from the Canadian shore?

183 A. I think the Conemaugh was not quite that much; she was a little closer than the stern end of that barge.

Q. Now, in that location, when the Conemaugh was a little closer than the stern barge, and the stern barge was a thousand feet from the shore, where, with reference to the stern barge, was the New York?

A. Down in between those boats, as I said before, somewhere along the last two barges.

Q. And nearer the Canadian shore, or nearer the barges than mid-stream and the Canadian shore?

A. Nearest the barges.

Q. What would seem to you a pretty close distance, 100 feet or so?

A. 50 or 100 feet.

Q. And you noticed that the steamboat New York came up by those barges somewhere between 50 and 100 feet?

A. Yes, sir.

Q. And when she came up by the last barge in the tow she seemed to swing out in the middle of the river?

A. I don't think it.

Q. Did she seem to swing towards the American shore or Canadian shore?

A. She seemed to keep her course.

Q. And you saw her keep on her course?

A. I don't know what course she had.

Q. Did you see her swing out to mid-stream?

A. No.

Q. She seemed to keep on the course she was on when she passed those barges?

A. Yes, sir.

Q. And just before the collision she seemed to swing under the starboard helm?

A. I didn't notice that.

OSCAR LAWSON, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. SHAW:

Q. You were employed at Smith's coal dock on the night of the collision between the Conemaugh and the New York?

A. Yes, sir.

Q. On what part of that coal dock were you at the time of this collision?

A. About 50 or 150 above the office.

184 Q. What signals did you hear blown by the Conemaugh, first, if any?

A. The Burlington gave her two blasts.

Q. What did the Conemaugh do?

A. Answered.

Q. State to the court what the Conemaugh did after answering that signal.

Mr. WISNER: I don't think there is any dispute about that. It seems to me that fifteen witnesses ought to settle that question. We certainly do not intend to offer any evidence contradicting the swinging of the Conemaugh as they have testified.

COURT: I will let the testimony go in. I do not know what counsel is seeking to establish.

A. She gave three whistles to check, I think.

Q. And what course did she take then?

A. Cross the river, towards the Canadian shore.

Q. As she was crossing the river did you hear any signals from her?

A. Yes, sir.

Q. What signal did you hear?

A. First two blasts.

Q. What were they apparently blowing to?

A. I don't know, or didn't know, until I looked down the river and I saw a steamer coming up.

Q. How far down was that steamer in your judgment, then?

A. About a mile or more.

Q. Was the signal from the Conemaugh answered by the one coming up?

A. No, sir.

Q. What next did you hear?

A. Well, she went a little farther and gave another signal.

Q. What was that signal?

A. Two blasts.

Q. Was that answered by the boat coming up?

A. No, sir.

Q. What further did you hear?

A. Well, when she got pretty well over towards the Canadian shore she gave her two more.

Q. Was that answered?

A. No.

Q. Did you hear another whistle after that?

A. Yes, several short whistles.

Q. As you saw the New York coming up, what part of the river did she appear to be in?

A. I think she was in the American waters.

185 Q. When you first saw her?

A. Yes, sir.

Q. As she came up and got near the tow could you tell what she was heading for?

A. I think she was pretty well in the center of the stream when she was near the tow coming up.

Q. What lights could you see?

A. Her red light and her masthead light.

Q. State whether or not you continued to see that red light.

A. When she got up to the tow pretty well, I should judge about 700 or 800 feet from her, I didn't see her red light; it was shut out.

Q. Just before the red light shut out, you could see the tail end of the tow from where you stood, could you?

A. Yes, sir.

Q. And you could see the New York?

A. Yes, sir.

Q. And how did the New York appear to be heading as to the tail end of the tow, to the Canadian shore, or to the American side, or for it, or how—just before her red light was shut out?

A. Well, she seemed to be going to run right through the tow, about ahead of the second last barge.

Q. What speed did the New York seem to be going?

A. I should judge she was running about eight or nine miles an hour.

Q. After her red light was shut out did you see it again?

A. Not until just before the collision.

Q. Just before the collision you did see it?

A. Yes, sir.

Q. At the time of the collision, what lights could you see?

A. I could see the red light on the New York and the red light on the Conemaugh.

Q. How did the masthead light appear, did you notice then?

A. No, I didn't notice then particularly.

Q. Now, did you notice about the position of the stern barge of the tow at the time of the collision, how far it was from?

A. I didn't pay much attention to the tow at that time. I was watching the steamers more than anything else.

Q. Can you tell whether the stern barge in that tow was anywhere near the two steamers as they came into collision?

A. The stern barge was below, I think.

186 Q. About how far below?

A. I should say a couple or three lengths anyway.

Cross-examination.

By Mr. WISNER:

Q. You were on a coal dock?

A. Yes, sir.

Q. Which is little more than half a mile from where this collision took place?

A. Well, it was a little over that, I think. It was across the river.

Q. You were across the river?

A. Yes, sir.

Q. The Burlington was between you and the collision?

A. No, sir.

Q. Wasn't she?

A. No, sir.

Q. Wasn't she at the dock?

A. Yes, but she was up ahead of us.

Q. What was your duty there?

A. We were called down—

Q. Not we, but Mr. Oscar Lawson I am talking about, just yourself. What was your duty?

A. I was called down to give a boat coal.

Q. You were called down to give a boat coal?

A. Yes, sir, the Burlington.

Q. Did you have anything to do with tying her up?

A. No, sir.

Q. Did you have to help with the lines?

A. No, sir.

Q. Did you get there before she did?

A. Yes, sir.

Q. You saw her then coming up in front of the dock?

A. Yes, sir.

Q. And pass by you?

A. Yes, sir.

Q. Could you distinguish the faces of the men on board of her as she came up?

A. No, sir.

Q. It was too dark for that?

A. Well, I didn't notice particularly.

Q. Could you tell whether a man you saw there was a white man or a colored man?

A. I suppose I could.

Q. Could you?

A. Yes, I could.

Q. Was it light enough so you could tell?

A. Yes, sir, I think I could tell a colored man from a white man from that distance.

187 Q. Could you see the men on the first barge of the tow?

A. No, I could not.

Q. Why not?

A. I was not looking at that.

Q. Didn't you look at them at all?

A. No, sir.

Q. You didn't look at the first barge in this tow at all?

A. No, sir; I was principally watching the signals that was given to the boat coming up the river. I didn't pay any attention to the tow whatever.

Q. Mr. Lawson, the steamer Burlington had passed by you on the dock before you heard any signal that night, hadn't she?

A. No, sir; she hadn't.

Q. She passed by you after you heard the first signal of the Cone-maugh?

A. Yes, sir.

Q. What is your business now?

A. I work at the glass works.

Q. The Burlington came up there and blew one whistle to the

Conemaugh, you were standing on the dock, the Conemaugh answered the whistle?

A. Yes, sir.

Mr. SHAW: I object to that as misleading. He has not testified that there was one whistle.

Mr. WISNER: Well, put in one whistle of two blasts.

Q. The Burlington passed by you a little way from the dock?

A. Yes, sir.

Q. And you didn't notice the first barge in her tow at all?

A. No, not particularly, I didn't.

Q. But it was light enough so you could have seen the men on her if you had noticed her?

A. Perhaps I could.

Q. What is your judgment about it? Was it light enough so you could distinguish the men on the first barge of the Burlington, 400 feet out in the stream?

A. No, I don't think I could.

Q. But you do think in the same kind of atmosphere, a half a mile away, you could tell the distance between the boats?

A. Well, I think you can see a light better than you can see a person in a dark night, or any kind of night. You can see a light farther than you can a man on a boat.

Q. Did you distinguish the lights of the Ferguson that night at all from another light on the river?

188 A. No, I didn't take particular notice.

Q. You did distinguish the lights of the Conemaugh from other lights in the river that night?

A. Yes, for I was principally watching her.

Q. And this collision took place pretty near abreast of your dock, didn't it?

A. Just a little above it.

Q. How much above it do you think you saw the boats the next day?

A. A couple or three boat-lengths, I should judge, from where I stood.

Q. Well, whose boat are you giving up the length of in that answer?

A. Well, the Conemaugh.

Q. And what was her length?

A. I should judge it was about 200 feet or more.

Q. What have you heard it said to be?

A. Well, I have not heard her exact length as I know of.

Q. Haven't you heard it stated at 250 feet?

A. I might have heard it.

Q. And you think it was four boat-lengths above abreast of your dock?

A. Two or three.

Q. You think it was 500 feet above directly abreast of Smith's coal dock?

A. Yes, sir; somewhere in that vicinity.

Q. And you saw the Conemaugh's green light when they came together?

A. Yes, sir.

Q. Do you know where the green light of the steamer is carried?

A. It is forward of her, I think.

Q. Where is it carried forward of her?

A. About 30 feet back of her stem, I should judge.

Q. And does it shine all around her on that side?

A. No, I don't think it can shine all around her, for it is set in boxes.

Q. Do you think it shines to a person almost directly astern of her?

A. No, sir.

Q. You have told the court that you did not distinguish the lights of the stern barge of the tow that night. Now, how do you arrive at the conclusion that at the time of this collision the stern barge was two or three lengths below the Conemaugh?

A. I don't know as I said the barge was two or three lengths below the collision. I don't think you have asked me that question.

189 Q. No, I didn't ask you, but you stated, didn't you, that the stern barge of this tow at the time of this collision, was two or three lengths below the Conemaugh?

A. Well, the tow was coming around, she would have to be there.

Q. And do you give it on the basis of what you think it must have been?

A. Well, yes, as near as I can judge.

Q. You didn't see it?

A. I seen the barge, yes, sir.

Q. Was it so light that you could distinguish the barge?

A. No, but you could see a dark object.

Q. But you did not distinguish her light. Now, isn't it true that you have been told by somebody that you must testify that that was about the distance?

A. No, sir, no one ever said anything to me about the distance.

Q. And it arises in your own mind that the distance between the last barge of that tow and the Conemaugh at the time of that collision, was two or three lengths of the Conemaugh?

A. Yes, sir, I should judge it was that.

Q. And you were standing a little more than half a mile away from it?

A. Yes, sir.

Q. And it was so dark you could not distinguish men 400 feet away from you, whether they were white or colored?

A. I don't think there was any boat within 400 feet from me.

Mr. Shaw: Who was standing with you on the dock?

A. Johnston.

Q. There was nothing in that tow, was there, to prevent you seeing the lights of the New York, as she went past them?

A. No, sir.

DORY LINDERMAN, after being duly sworn on behalf of the libellant, testified as follows:

Examined by Mr. SHAW:

Q. Your husband is the superintendent of Smith's coal dock, is he not?

A. Yes, sir.

Q. And do you live there on the dock?

A. Yes, sir.

190 Q. You were there the night of the collision between the Conemaugh and the New York?

A. Yes, sir.

Q. And where were you at the time that collision occurred?

A. In the office door; that is, when the Burlington came in. We were out on the dock when the collision occurred.

Q. Your doorway looks out on the river, does it?

A. Yes, sir.

Q. You could hear the signal between the Conemaugh and the Burlington?

A. Yes sir.

Q. Did you notice the Conemaugh turning towards the Canadian shore right after that?

A. Yes, sir.

Q. After the Conemaugh had so turned towards the Canadian shore, what was the next thing, if anything, you heard from the Conemaugh?

A. A check whistle; that is, three little whistles.

Q. Three engine whistles?

A. Yes, sir.

Q. What did you next hear, if anything, from the Conemaugh?

A. I heard two whistles after that.

Q. At that time did you notice whether there was any boat coming up the river?

A. Yes, sir.

Q. How far down?

A. I could not state. I am not judge enough about that.

Q. Did the boat coming up the river answer?

A. No, sir, not that I heard.

Q. What was the next thing that you heard from the Conemaugh, if anything?

A. I think she blew two blasts and then she blew three after that.

Q. At any time did you hear any signals from the boat coming up the river?

A. No, sir.

Q. You were watching the boats all this time?

A. Yes, sir.

Q. As the boats came up the river, how did she appear to you to be heading as regards this tow?

A. She seemed to me, the way we were looking through the glasses, she was heading for the second last barge.

Q. How near did she get to that barge on that course?

- 191 A. I could not say just the distance.
Q. Can you give us any judgment?
A. I should judge about two boat-lengths.
Q. And up to that time, what lights could you see of a boat coming up?
A. I could see a red and a white and a green light.
Q. After she got that far, two or three lengths, what light did you see from her?
A. She seemed to close out the green light and all I seen then was the red light, and after a while I did not see the red light.
Q. Where was she when you ceased to see the red light?
A. She was starting to turn, I think.
Q. Whereabouts, as regards the tow?
A. Just a little ways from the tow when she turned.
Q. And did you at any time after that see the red light?
A. Not until she came in contact with the Conemaugh.
Q. Who was with you on the dock?
A. Mr. Linderman's brother.

Cross-examination.

Mr. KREMER :

- Q. What lights did you see on the New York first?
A. The lights they carry in front. Of course I don't know the names of the lights. That is, the red light and the bright light.
Q. Those were the first lights you saw of the New York?
A. Yes, sir.
Q. And then you continued to see those until the red light was shut out?
A. Yes, sir.
Q. And that was just before the collision?
A. No, that was when she started to turn over to the Canada side.
Q. Then she shut out her red light?
A. Yes, sir.
Q. And you also saw her masthead light?
A. I didn't notice that until she turned again.
Q. Had she turned again?
A. Yes, sir.
Q. Then when she turned again she showed you a red light?
A. Yes, sir.
Q. Then you at no time saw a green light on her?
A. I did when she came up the river.
Q. Haven't you just testified you saw only her red light?
192 A. I told you first her green light.
Q. When did you see her green light?
Q. When she came up the river, when she was going up towards the barges.
Q. The first light you saw on her was a red light?
A. I could not help seeing them all when I saw one.
Q. You could see them all then?

- A. Yes, sir.
- Q. What colored light was she showing you then?
- A. The green and the bright and the red light.
- Q. And that was when you first saw her?
- A. Yes, sir.
- Q. And you kept seeing those lights until when?
- A. Until she came near the barges, started to turn.
- Q. And then what became of her lights?
- A. She shut them out.
- Q. Shut them all out?
- A. All but the bright light, of course you could see that.
- Q. Where was the Burlington when you first saw the New York?
- A. She was just coming up the dock.
- Q. Where was the Burlington when the New York shut out her lights?
- A. Right above the office.
- Q. Where was the tow?
- A. Coming around in the river.
- Q. Coming around after her?
- A. Yes, sir.
- Q. You heard the Burlington blow to the Conemaugh, didn't you?
- A. Yes, sir.
- Q. When was it she shut out the lights with reference to that before or after the Burlington blew?
- A. After.
- Q. Did you hear the Burlington blow to the New York?
- A. No, I didn't.
- Q. Did you hear the New York blow?
- A. No, sir, I didn't.
- Q. And at the time the New York shut out her lights, had the Conemaugh blown to her?
- A. Yes, sir.
- Q. Blown her first signal?
- A. She blowed two whistles several times, two or three times.
- Q. She had blown to her two signals two or three times before the New York made any change?
- A. Yes, sir.
- 193 Q. Then it was after she had got through whistling to the New York that the New York had made the change?
- A. I don't just remember that, but I know she made the change just when she came up.
- Q. You heard the Conemaugh whistling to her, didn't you?
- A. Yes, sir.
- Q. And you say you heard it two or three times?
- A. Yes, sir.
- Q. And that had all taken place, had it, before the New York made this change?
- A. Yes, sir, as the New York was making this change the Conemaugh blew the three whistles.
- Q. That was the alarm?

A. Yes, sir.

Q. And up to that time you had seen the red and green lights of the New York?

A. When she was coming up, yes.

Q. And then you heard the three whistles, and then the New York shut out her lights to you?

A. No, she started to shut out her lights before the Conemaugh blew three whistles.

Q. Had she shut them all out before the Conemaugh began to blow those three whistles?

A. Yes, sir.

Q. Had she shut them out before or about the time the Conemaugh blew the three whistles?

A. I don't just remember. I know I could not see her lights after the Conemaugh blew the three whistles.

Q. What I would like to know is, whether she shut them out before the Conemaugh blew the three whistles or afterwards?

A. I didn't take notice of that.

Q. What is your best recollection now, as to whether they occurred at the same time, before or after?

A. I think he must have had the lights shut out, because it was a few minutes after that when the crash came.

Q. Was it long between the time the three whistles were blown and the crash?

A. No, sir.

Q. Can you tell me how long?

A. No, sir; I could not.

Q. Can you count it in minutes?

A. No; I didn't take enough notice of that. I was watching the boats.

Q. And it was just a short time before that that the New York had shut out her lights?

194 A. Yes, sir.

Q. Was it as long as the time between the three whistles and the crash that she shut them out?

A. I don't remember. It would be impossible for me to state that.

Q. Your recollection, however, is that it was only a short time before the collision?

A. Yes, sir.

Q. You don't know abreast of which barge the collision occurred?

A. No, sir.

By Mr. SHAW:

Q. At the time of the collision, did you notice where the tail end of that tow was?

A. It was up kind of slanting.

Q. But as regards the point of collision, had the tail end of the tow got down below the place of the collision or above.

A. Below.

Q. How much below ?

A. I could not say.

Q. Was it quite a little distance or close ?

A. It was quite a little distance.

Recross.

Mr. KREMER :

Q. Could you see that barge ?

A. Yes, sir ; we had glasses to watch the boats.

Q. Where were you looking at the time you heard the crash ?

A. We were watching the New York and the Conemaugh.

Q. Were you using the glasses yourself ?

A. Yes, sir.

Q. At the time ?

A. Yes, sir.

Q. Could you with the glasses see the barge or only her light ?

A. We can distinguish the barge with the glasses.

Q. When you say we, whom do you mean ?

A. I suppose any one who uses them.

Q. Who was using them at this time ?

A. I was.

Q. Had the barge begun to turn across the river, the last two barges, or were they still straightening down the river ?

A. I don't know what you mean by that.

195 Q. Were they in line as though going down the river, or had they began to turn across the river at the time of the collision ?

A. I don't understand you.

Q. Taking this to be the Canadian shore, were they straight, like this, or had they got to going across ?

A. That last barge was coming down more.

Q. The last barge hadn't begun to turn, it was still straight ?

A. I don't know what you mean by turning.

Q. These barges come around to docks and must turn ?

A. Yes, sir.

Q. Had this barge begun to turn, or was she still straight after the Amaranth or next to the last barge in the procession ?

A. I could not say as to that. I was watching the other two boats. I didn't watch them.

COURT: Could you see the boats over the barge or clear of them when you looked at them with the glasses ?

A. They were clear of the barges then.

COURT: Were they between the barges or behind the barges or astern of the barges ?

A. They were above the barges when they came together.

Q. Above the barges ?

A. Yes, sir.

HARRY P. LINDERMAN, after being duly sworn on behalf of the libellant, testified as follows :

Examined by Mr. SHAW :

Q. You were on Smith's coal dock near Mrs. Linderman, I believe, at the time of the collision between the New York and the Conemaugh?

A. I was.

Q. Did you hear the signals between the Conemaugh and the Burlington?

A. I did.

Q. What was the signal?

A. Signal of two blasts given by the Burlington.

Q. What did the Conemaugh do?

A. She answered with two blasts.

Q. What else?

A. And checked down and went across towards the Canadian shore.

Q. How soon after she answered the Burlington's signal did she check down?

A. Right after.

196 Q. Then what other signals, if any, did you hear from the Conemaugh?

A. Two blasts.

Q. Did you see anything coming up the river at that time?

A. Yes, sir.

Q. Was there any answer to that signal from the boat coming up?

A. There was not.

Q. What other signals did the Conemaugh blow?

A. Another signal of two blasts.

Q. Was that answered?

A. No, sir.

Q. Any other?

A. Yes, another signal of two blasts.

Q. Anything to that after that?

A. Several short whistles.

Q. During all this time were there any answers by the boat coming up?

A. No, sir.

Q. What lights did you see on the boat coming up the river?

A. I saw the headlight, the green light and the red light.

Q. As she came up, which light did you lose first, if any?

A. The green light.

Q. Did you lose the others at any time?

A. Just as she commenced to turn where she came up the river and got pretty near the barge, she commenced to swing over to the Canadian shore and I lost her red light.

Q. At the time you lost that red light, was she below the tow a little or a little above it, or right up to it?

A. She was about two lengths below the tow.

Q. What caused you to lose that red light, if you know?

A. When she commenced to turn.

Q. Was there anything there, if she didn't turn, if you saw, to prevent you from seeing the red light?

A. There wasn't anything.

Q. Did you see the red light again at any time?

A. Yes, sir, just before the collision.

Q. How fast was the New York going, in your judgment?

A. About nine miles an hour.

Q. How long have you been on that dock?

A. Two summers.

Q. Have you noticed the usual course of boats bound up and down the river at that point?

197 A. I have.

Q. Which side of midchannel is usually used by steamers going down?

A. Going down most generally they take the Canadian side; most always.

Mr. GOULDER: Mr. Linderman, you are not to be affected by the actions of the counsel over there, in their smiling among themselves. They are not trying to frighten you in any way.

Q. What point are they nearest the Canadian shore generally coming down?

A. How is that?

Q. At what point up or down the river do they generally come closest to the Canadian shore?

A. Just below the Kasota there.

Q. Do you know where Sandwich point is?

A. Yes, sir.

Q. Now, after leaving Sandwich point, what course do they usually take until they get down to the head of Fighting island?

A. Until they get abreast of Smith's coal dock then they commence to go towards the center right off.

Q. Did you hear any engine signals on the New York that evening?

A. No, sir, I did not.

Q. At the time the boats came together; that is, the Conemaugh and the New York, how did they look to you, did they appear to you to be nearer or farther from the Canadian shore than the last barge in the tow?

A. I could not say.

Q. Where did the last barge in that tow appear to be from them, above or below them?

A. Below them.

Q. About how far?

A. Well, I could not say exactly.

Q. Can you give us your judgment?

A. I think it was about two lengths of the Conemaugh.

Cross-examination.

By Mr. KREMER:

Q. How long is the Conemaugh?

A. 250 feet.

Q. How do you know that?

A. I have heard it.

Q. Was it as much as two lengths from the Burlington?

A. It was more.

Q. Was it as much as two lengths of the New York?

198 A. I don't know how long she is.

Q. You saw her just as well as you saw the Conemaugh.

Now, tell us?

A. I never heard the dimensions of the New York.

Q. Then it depends upon what the dimensions of the boat are before you can tell the distance?

A. I would say about 500 feet, then.

Q. Were you looking at them with glasses?

A. I was.

Q. At the time they came together?

A. Yes, sir.

Q. How many sets of glasses did you have there?

A. Two.

Q. Who was using the other set?

A. Mrs. Linderman.

Q. Do I understand aright that the distance between the last barge and the collision was 500 feet?

A. About that I should judge.

Q. Do you know where with reference to your dock the collision occurred, or where you were standing on the dock, up or down the stream from that place?

A. Just a little above it.

Q. And where was the Burlington at the time the collision occurred?

A. It was just a little above where I was standing.

Q. Did you look over the Burlington or under her stern?

A. I looked right over the tow-line.

Q. Between her and what?

A. The first barge.

Q. Was the Burlington moving at that time?

A. I could not say; I was not watching her.

Q. Now, where do up-bound steamers go in that river?

A. They most generally take a course and go about the center of the river, and then the other side of the Kasota's piles. They take the American shore up.

Q. That is abreast of Smith's dock. The up-bound steamers navigate the American water?

A. Yes, sir.

Q. And they continue to do so until they get to about where the Kasota's piles are?

A. They go right the other side of the piles.

Q. On which side?

A. On the Canadian side about the center of the river.

Q. And the down-bound steamers, they take the Canadian side of the river too?

A. They take towards the bank.

Q. What bank?

199 A. The Canadian bank.

Q. Was the collision above or below where the Burlington was laying at the time it occurred?

A. Well, I should judge it was about abreast of the Burlington.

Q. Did you see the New York when she was abreast of where you stood?

A. I don't know whether I was looking at her or the Conemaugh.

Q. Did you notice what barge she passed when she was abreast of you?

A. She was going right by the last barge in the tow.

Q. When she was abreast of you?

A. Yes, sir.

Q. And that was the time that she shut out her red light?

A. No, sir.

Q. Was it before that?

A. Yes, sir.

Q. About abreast of which barge was she when she shut out her red light?

A. The third barge.

Q. You know the name of that barge?

A. No, sir.

Q. Did she show you the red light again before she got to the last barge?

A. No, sir.

Q. Did she show it to you any time before the collision?

A. Yes, sir, just before the collision.

Q. I wish you would place the barges here, and the Burlington and the New York in the position which they were at the time that the New York shut out her red light to you?

A. It was right there. She must have turned enough to shut out the light.

Q. Do you know whether you can see those lights from aft?

A. You cannot.

Q. Do you know whether you can see them from abeam?

A. Yes, sir.

Q. Do you know how far abaft the beam they show?

A. Two points.

Q. If she turned enough to get that light more than two points abaft of beam, it would not show to you, would it?

A. No, sir.

200 Q. Where were you standing with reference to this tow and the New York, where on the dock?

A. Right about there.

Q. Right astern of the Burlington?

A. Yes, sir.

Q. You had to look over the barges towards the New York at that time?

A. I could see right across the tow-lines.

Q. Now, up to the time that she shut out the red light to you, she had been showing you what lights?

A. Her red and her head light.

Q. Could you tell whether she was passing close to that barge or not?

A. She was not a great ways from her.

Q. She was what you call close then?

A. Yes, sir.

Q. Did you notice whether she passed close to that last barge?

A. No, sir.

Q. You didn't notice that?

A. No, sir.

Q. But you did notice that she passed close to the Amaranth, the next to the last barge?

A. Yes, sir.

Q. Can you tell us with reference to this whistle that the Conemaugh blew to her, as to when it was that she shut out her green light? Was it after the first blast that the Conemaugh blew?

A. Yes, sir.

Q. It was after the first blast?

A. Yes, sir.

Q. Did the Conemaugh blow any whistle until she was heading across to the Canada side?

A. Yes, sir.

Q. She blew before that?

A. Yes, sir.

Q. To whom did she blow?

A. To the steamer Burlington.

Q. Then did she blow to the New York until after she was heading across to the Canada side?

A. She had turned to go across before she whistled.

Q. Then after she blew that whistle you then saw the New York?

A. Yes, sir.

Q. And you saw both her lights?

A. Yes, sir.

Q. And then the New York shut out her green light and showed only the red light?

A. Not right away.

Q. Was it after the next blast of the whistle of the Conemaugh?

A. I think it was about the third blast.

Q. And how close was she to the tow when she shut out her green light? How close was the New York to the tow?

A. I could not see her green light. She was quite a distance from the tow.

Q. About how far was she from the tow when you first saw her?

A. She was about three-quarters of a mile.

Q. And when she shut out the green light she was about half a mile?

A. About that.

Q. And when she shut out the red light she was close to the next last barge?

A. Yes, sir.

MICHAEL CROWE, sworn on behalf of libellant.

Examined by Mr. GOULDER:

Q. At the time of this New York and Conemaugh, when the Conemaugh was sunk down here, were you on the Conemaugh?

A. Yes, sir.

Q. And in what capacity?

A. I was deck hand on it.

Q. At the time of that collision, and for a little while before it, whereabouts were you on the boat?

A. I was standing on the starboard side about amidships.

Q. Do you remember seeing anybody else in that neighborhood?

A. Yes, sir, I saw somebody else there. I didn't take any notice who it was.

Q. Did you find out afterwards who it was?

A. Yes, sir, the watchman, I believe.

Q. The man who just left the witness stand, Mr. Fred May?

A. Yes, sir.

Q. With the explanation here about the clump of piles down there and with a light on them, called the Kasota's piles, do you remember noticing them at all?

A. No, sir, I didn't notice them.

Q. Do you remember any signals passing between your steamer and the boat we call the Burlington?

202 A. I remember hearing two whistles down the river somewhere. I do not remember where they came from.

Q. When those two whistles were heard, can you give us any idea of the part of the river your boat was in?

A. I could only see one side. It looked to me to be out in the middle of the river. I could not tell how far from the other side.

Q. When you heard those two whistles down there, state all that occurred on your vessel?

A. Well, I heard the Conemaugh answer the two whistles and I heard him check at the same time, or a little after, and I noticed her swing around towards the Canadian shore.

Q. From that time until the collision, what is your recollection about the general course of your vessel?

A. I think she was heading across the stream, and a little down, if any. I could not say how much.

Q. Did you, between the time of your boat's swinging out there and the collision, hear any signals with the big whistle on your boat?

A. Yes, sir.

Q. What were they?

A. I heard her give two signals of two blasts each.

Q. Did you hear any other signal than that?

A. Yes, sir, I heard her blow several short whistles.

Q. What is that called on a steamboat, what kind of signal?

A. I didn't know just then what it was for. I found afterwards.

Q. Now, I want to call your attention to those two signals. Did you see this steamer down the river, which we call the New York?

A. Yes, sir.

Q. When did you first notice her?

A. Well, after he blowed the first two blasts to her.

Q. Where did you see that boat go?

A. Down about the middle of the river, I think.

Q. And with reference to the tow, where was she?

A. She looked to be below the tow quite a ways.

Q. Tell the court what lights you saw on that boat?

A. I saw both side lights and masthead light.

Q. And when do you remember noticing that there had been any change about those lights?

A. Well, when I—after he blowed the second blast of the two whistles, I only saw one light then.

Q. Which one?

A. The red light.

203 Q. At the time you blew the last signal, which you described as a number of toots, had you by that time or not seen that tail of that tow, the last barge of that tow?

A. Yes, sir.

Q. Now, take it at the time of the alarm whistle. Are you able to state, and if so, you may state, as it appeared to you, which was closer to the Canadian shore, your vessel, or the tail end of the tow?

A. I think the Conemaugh was.

Q. And in your best judgment, how far down the river below you was that tail of the tow, that last barge?

A. I should think between three and four lengths of the Conemaugh.

Q. And what do you say as to the distance she appeared to be out from the Canadian shore at that time?

A. I don't know. I don't think it was half way in the middle in the river. She was over a quarter of the way out from the Canadian shore.

Q. At that time of blowing the alarm whistle, state if you can, where the New York was or where she seemed to be?

A. Well, she was somewheres around the last barge of the tow.

Q. You were then seeing what lights of the New York?

A. The red light and the masthead light

Q. And your position you have stated was where on your boat?

A. About amidships of the starboard side.

Q. From that time until the collision, you may state what light you continued to see?

A. I saw the red light until the time of the collision. The red light and the masthead light was the only light I saw.

Q. Are you able to tell from the view you had of it whether the New York from that time when you saw her around the last barge kept on a straight course, or whether she swung one way or the other?

A. I didn't notice her swing any.

Q. And where did this collision occur with reference to the Canadian shore?

A. Well, I would think it was pretty close to the shore, I could not tell how far it was.

Cross-examination.

MR. KREMER:

Q. How close did the New York pass the last barge of the tow?

A. I don't know exactly how close she passed.

Q. She passed pretty close?

204 A. Well, I cannot say.

Q. Did you see her pass her?

A. Yes, sir, but I didn't pay any particular attention to her.

Q. How did you happen to notice how far the barge was away from them?

A. Well, I was looking that way.

Q. Were you trying to measure the distance between the Conemaugh and the last barge?

A. No, sir.

Q. Now, then, if you were not doing that how do you happen to know the distance?

A. I was looking down that way, looking at the New York coming.

Q. And you saw the barges, and you saw the New York coming?

A. Yes, sir.

Q. Now, then, you certainly have an impression whether it was close or far away from that barge?

A. It wasn't very far, I don't think.

Q. You could tell at that time whether she was swinging or not?

A. No, sir.

Q. Had the Conemaugh passed by the barge at that time?

A. How do you mean?

Q. Passed the stern of her?

A. Yes, sir, I think she did.

Q. That was at the time the alarm whistles were blown?

A. Yes, sir.

Q. Had the whole of the Conemaugh got past the stern barge at that time?

A. I didn't notice.

Q. Which way did you look to see the stern barge?

A. Well, I looked a little towards—right about abreast of me, I think, maybe a little back.

Q. A little forward, didn't you?

A. Maybe a little astern.

Q. And at that time the New York has not passed the stern barge?

A. I could not say whether she was passed her. She was somewhere close around her anyway.

Q. But you cannot say whether her bow had got past the stern of her or not?

A. I could not say.

Q. As you now remember it, she was somewhere alongside there?

205 A. Yes, sir.

Q. You could not tell whether she was swinging either way at that time?

A. No, sir.

Q. You don't know whether she swung any up to that time?

A. No, sir, I didn't notice her swing any.

Q. Did the collision occur a short time after the alarm signals?

A. Well, it wasn't a very long time, I don't think.

Q. When you heard the alarm signals, did you move away from where you stood?

A. Yes, I walked aft.

Q. How far aft did you get when the crash came?

A. I don't remember.

Q. Didn't you look around when the collision occurred?

A. Yes, sir.

Q. You stopped then?

A. Yes, sir.

Q. Can't you tell us what part of the Conemaugh you had got to when you heard the crash and looked around?

A. I don't remember what part I got to because I came back up forward and looked at it.

Q. You did not get to the stern?

A. I don't think I went that far.

Q. Where were you standing when you started to go aft?

A. About amidships.

Q. And you hadn't got to the stern when the collision occurred?

A. Well, I might; but I don't think I walked that far.

Q. Did you stand and wait for the collision?

A. I was not waiting for the collision, no, sir, but I saw her coming that way and I thought I would move aft of it. I don't know what the cause of it was.

Q. Did you run or walk?

A. I walked, I think.

Q. Have you any recollection of walking or running?

A. Well, I hardly ever run aboard a steamboat, sir.

Q. Were you not still walking when the collision occurred?

A. I don't remember.

Q. But do you remember you didn't get quite aft when the collision happened?

A. I don't think I got quite aft.

Q. In other words, you didn't have time enough from the time

the alarm was blown to walk from where you were to the after part of the vessel?

206 A. I don't remember. I don't know whether I did or not. I didn't go quite aft, but I stood about half way from where I first stood amidships, to aft, stood there.

Q. Did you stand there long?

A. I don't remember how long I stood there.

Q. Do you remember that you stood there?

A. I do.

Q. Do you remember positively of standing still?

A. Yes, sir, I remember of standing there, I don't remember how long.

Q. Will you say it was a very short time from the time the alarm whistles were blown until the collision occurred?

A. Well, I don't know exactly how long it was; but it wasn't a very long time.

Q. Will you say it was a very short time?

A. Well, what do you call a very short time?

Q. Well, what do you call a very short time?

A. Well, I should call a very short time when it wasn't time to get out of the way.

Q. Then the fact that you had just enough time to get out of the way was just a short time——

Question objected to.

Q. You could not tell us in seconds how long it was, could you?

A. No, sir,

Q. Where was the Conemaugh, what was she doing, when the first signals were blown to the New York?

A. She seemed to be heading across the river.

Q. Did you see the New York then?

A. I saw her after he blew the first two blasts.

Q. Where was the New York then?

A. She looked to be about the middle of the river.

Q. Did you see any of her lights?

A. Yes, sir, I saw both side lights and masthead lights.

Q. Where was the Conemaugh when she blew the next signal to the New York, on what course?

A. She seemed to be heading across stream and a little down.

Q. And what lights of the New York did you see then?

A. Well, I saw both colored lights and masthead lights.

Q. That was when she blew the second——

A. Well, I don't know exactly whether it was after she blew the second or before she blew it that I lost her green light.

A. And you cannot tell that?

A. No, sir.

207 Q. Where was she when she blew the third signal to the New York?

A. She was somewheres astern of the last barge.

Q. Close to her?

A. Well, I think between three and four boat-lengths of the Conemaugh.

Q. And then where was she when she blew the alarm whistles, how close to the stern barge?

A. She was not much closer, I don't think.

Q. Was she any closer?

A. I don't think she was.

Q. Same distance?

A. About the same.

Q. Had the Conemaugh changed her heading any from the time she blew the first two blasts to the New York and until she blew the alarm signal?

A. I could not tell exactly how much she changed.

Q. Did she change any?

A. I cannot say.

Q. At the time the Conemaugh blew the alarm was she further away from the stern barge when she blew the last two blasts?

A. I just told you she was about the same distance, I thought.

Q. No nearer or no further?

A. Not as I know of.

Q. And at the time she blew the two blasts she had not passed the stern barge, had not got under her stern?

A. I said it was somewheres astern of her.

Q. Was she abreast of the barge when she blew the last two blasts?

A. I think she was about astern of her.

Q. What part of her was astern of the barge, the bow?

A. I don't know.

Q. Were the last two signals, that is, the last two blasts to the New York, and the alarm signal, blown quickly one after another?

A. Well, there was some space of time, I don't exactly know how long.

Q. Was it much?

A. I cannot say how much.

Q. Was it as much as the space of time between the alarm signal and the crash of the collision?

A. No, sir, I don't think it was.

Q. At the time the alarm signal was blown the Conemaugh's bow had passed from under the stern of the last barge?

A. I should think she was between three and four boat-lengths.

208 Q. What boat-lengths?

A. The Conemaugh.

Q. How long is the Conemaugh?

A. I never measured; she is quite a boat.

By the COURT:

Q. You were standing amidships at the time. How long did you stand there?

A. Well, between twenty minutes and half an hour.

Q. You had been standing there before, and where were you when the third signal was blown of two blasts?

A. I don't remember exactly where I was standing, whether I was standing at the same place or whether I walked aft.

Q. Where were you when the alarm signals were blown?

A. I think I was standing aft a little more.

Q. Then where did you go, or did you move?

A. I walked forward a little more, about where I was the first time.

Q. Where did you get to at the time of the collision?

A. I was about amidships.

Q. How long had you been there before the collision came?

A. Well, I could not say exactly how long.

Q. Did you walk aft, from the place you were standing amidships, at the time of the collision, between the alarm signal and the collision?

A. Yes, sir.

Q. About how far?

A. I could not say, about 40 or 50 feet, I think.

(By Mr. GOULDER:)

Q. But you say you don't recollect how long you stood amidships before she struck?

A. No, sir.

By Mr. WISNER: I am not just clear about your honor's inquiry of the witness and I would like to ask him some questions.

COURT: Certainly.

Q. You say, Witness, that you had been standing amidships 20 minutes or half an hour before the signals with the Burlington were exchanged?

A. No, sir.

Q. Well, what did that twenty minutes or half an hour cover?

A. The first signals I heard when I was there was the barge blowing two blasts down the river.

Q. Then you came up on deck about the time the Burlington blew?

209 A. Yes, sir, probably I was standing there a little while before.

Q. You tell this court that you don't know that you came on deck when those whistles were blown from the Burlington, or you had been there some time before?

A. I was there before the whistles were blown, yes, sir.

Q. How long before?

Mr. GOULDER: I object to the second counsel coming into this kind of cross-examination.

Q. Now, Witness, will you tell the court whether you came on deck about the time you heard the Burlington's blasts of two whistles or you had been there some time before that?

A. I was there before that.

Q. How long were you there?

A. I don't remember.

Q. Can you tell within half an hour?

A. I was not there half an hour before it.

Q. Can you tell within ten minutes?

A. No, sir, I cannot.

Q. You can't tell whether you were there ten minutes or more than ten minutes, before the Burlington blew her whistles?

A. No, sir, I don't remember.

Q. What were you doing there?

A. I was standing there smoking, I think.

Q. Leaning on the rail?

A. I don't remember whether I was leaning against the rail or leaning against the cabin, I ain't sure.

Q. You don't know whether you were leaning on the rail or leaning on the cabin?

A. I say that.

Q. Talking with anybody?

A. No, sir.

Q. All alone in your thoughts?

A. Yes, sir.

Q. Not on watch?

A. No, sir.

Q. And you heard the exchange of whistles with the Burlington?

A. Yes, sir.

Q. Who blew first?

A. The Burlington, I think.

Q. You heard the three blasts, you say?

A. Yes, sir.

Q. And at the time you heard the last blast you were standing at the same place amidships, where you had been 15, 20 or 30 minutes?

210 A. I don't understand you, sir.

Q. You stated you stood about amidships leaning on the rail or the cabin, you didn't know which?

A. Yes, sir.

Q. When the Burlington and the Conemaugh exchanged signals?

A. Yes, sir.

Q. The next whistle you heard blown was the Conemaugh's deck whistle of two blasts?

A. Yes, sir.

Q. You then stood in the same place?

A. Yes, sir.

Q. You hadn't moved at all?

A. No, sir.

Q. Then you heard another blast of two whistles?

A. Yes, sir.

Q. And you still stood in the same place?

A. Yes, sir.

Q. You then heard another blast of two whistles?

A. Yes, sir.

Q. And you still stood in the same place?

A. I can't say. I don't remember whether I was in the same place or not.

Q. But you do remember distinctly that you stood in the same place when you heard the second blast?

A. Yes, sir.

Q. And when you heard the third two whistles, you were in the same place, or you had walked 30 or 40 feet aft?

A. Yes, sir.

Q. And you were either at that point, you say, 30 or 40 feet abaft of amidships, when you heard the third blast or you were walking from amidships to that point?

A. Yes, sir.

Q. Then you were at that point 30 or 40 feet abaft of amidships when the alarm was blown?

A. Yes, sir.

Q. And when the alarm was blown you started to walk forward?

A. Yes, sir.

Q. And you reached about the place where you had been before?

A. I don't remember whether I was standing there or had just got there by the time she struck.

Q. You think you got there?

A. Yes, sir.

Q. And the collision either took place then, or a short time after that?

211 A. Yes, sir.

Q. You walked there with your usual gait; you didn't hurry at all?

A. No, sir.

Q. You were not looking for any collision?

A. No, sir.

Q. Nothing had excited you in any way?

A. No, sir.

Q. You hadn't said anything to Mr. May, who stood close by you?

A. No, sir.

Q. You had passed him going up forward?

A. I didn't pass him. He was standing the other side of me. He was standing further forward than I was, but I didn't know who it was at that time.

Q. And was he with anybody?

A. No, sir; I didn't notice anybody else.

LOOMIS P. SMITH recalled.

By Mr. GOULDER:

Q. At the close of your testimony there was said by way of question and answer, about your porting on the Ferguson, and the effect or possible effect of that as to shutting out the green light of the approaching propeller New York, do you remember that subject of your testimony?

A. Yes, sir.

Q. I want you, if you will, to explain to the court, your vessel lying in the position she did under those circumstances, the effect of putting your helm aport?

Objected to. He said it would swing her bow.

Objection overruled.

Q. What would the effect be as to your stern?

A. Excuse me, if I said her bow, I didn't mean that. It would slew her stern, it would not change the position of her bow.

Q. But changes the direction of the heading of the boat by swinging the stern?

A. Yes, sir.

Q. On this occasion, then, as the propeller approached you, describe what the effect of putting your helm aport was, as you testified you did.

A. It would have the effect of throwing me, myself, in view of the green light of the New York, more than I was, if anything.

212 Q. You were standing where on your boat?

A. I was standing just forward of the cabin on top of the deck load.

Q. You were there in that position when the New York, in the place you describe, closed out her green light?

A. Yes, sir.

Cross-examination:

Q. What was your speed?

A. A very little faster than the current, a little over two miles an hour.

Q. What is the current there?

A. About two miles.

Q. What was your speed then?

A. A trifle over two miles.

Q. How much over a trifle?

A. I could not say at all.

Q. You could not say at all?

A. How much over the current?

Q. Yes.

A. No, sir; I can't.

Q. You don't know whether this speed of yours was greater than the current?

A. A trifle.

Q. A half mile?

A. I don't think so.

Q. Over a quarter of a mile?

A. Between that and nothing.

Q. And porting your helm with less than a quarter of a mile an hour headway would swing your stern to port, would it?

A. Yes, sir.

Mr. Goulder offers in evidence a Government chart revised to August, 1891.

Mr. WISNER: I think we are perfectly agreed that this is a correct plat of the location.

COURT: You can give the distances.

The chart is marked "Kasota Piles."

Mr. Goulder then made the following statement:

Mr. GOULDER: I will make my statement with reference to the chart and the enlargement. On the part referred to we have marked a clump of piles opposite the circular marked "Kasota." These are located on a line N. E. half N. from the northerly corner of the Michigan Central dock and the same distance from the River Rouge, distant one mile and three-eighths from the fort and about 1,950 feet from the Canadian shore. We also present an enlargement of that chart on a scale of 200 feet to the inch, with the Kasota's piles similarly located.

213 HUGH O. MILLER recalled on behalf of the libellant.

Examined by Mr. GOULDER:

Q. I hand you a tow consisting of five vessels in miniature to represent the Burlington, the Wesley, the Republic, the Amaranth, the Ferguson, in the order named, according to the length given in this case and with a tow line 600 feet in length between the Burlington, the first of the tow, and lines of 500 feet between the other tows; all these being fixed on a scale of 200 feet to the inch, and also two other models each 250 feet in length on that scale. I wish you would take these and use them in the answer to the questions which I am about to put to you. I first call your attention to the canal at the upper end of the Michigan Central Railroad dock, which is a continuation up the river from Smith's coal dock through that canal.

A. Yes, sir.

Q. Now, come over on this side and stand here, so as to look from the Canadian side, say where the Conemaugh was when she was sunk.

A. I could not say from the canal, but from the coal dock I could, or a little above it.

Mr. WISNER: Mr. Goulder has recalled him for the purpose of putting questions to him which properly belong to the examination-in-chief, after he has been examined in chief, and after some twenty witnesses have been examined since he was on the stand.

COURT: I want to get all the light I can on the controversy, and I should surmise this examination to be directed to the application of those models to the situation.

Mr. WISNER: I don't make any criticism if it is new matter.

COURT: I would not be disposed to allow the criticism if the object of the examination is to elucidate more fully what he has testified to by the application of these models, and I must assume that the counsel is acting in good faith.

Mr. GOULDER: I simply called the witness to apply these models on this map and as a preliminary to it. I wanted him to indicate on the map where his boat was.

Court: Proceed.

Q. You were about to show us where the collision was. Here is the coal dock down here, Smith's dock, here is the Michigan Central Railroad Company's dock, which goes up there, and there is the canal, here is a marsh, there are the piles, and the question is for you to indicate here where your boat was.

A. Where she sunk?

214 Q. Yes, or where the collision occurred.

A. Somewheres about here is where we were, about at that angle.

Court: Heading upstream?

A. Yes—after we were sunk.

Mr. GOULDER: .

Q. Was that your idea of it? Your idea of it is that the letter "K" in the channel bank is about midships of your boat?

A. About that, or somewheres about that.

Q. I wish you would put the tow, or that part of it which you paid attention to, in the position, as near as you can, where they were when the collision occurred.

A. It must have been something like that (placing models).

Q. Now, put your boat where she was.

A. When the collision occurred?

Q. Yes. Now, have in mind the position you want to put her.

A. About like that.

Q. Now, put the New York in collision with her.

A. About like that.

Q. In your testimony you put her three lengths of your vessel below there.

Mr. WISNER: I object to the counsel leading the witness.

Mr. GOULDER: The witness is giving his estimate of the distance and it is a little difficult to put things on a chart.

A. Just about the time he was hitting us there was something else to think of at that time. That is about as the thing occurred to me, you know, at that time.

Q. There is about three lengths of your steamer there—

Mr. WISNER: I object to my brother leading his witness.

Court: Of course, you will avoid leading questions.

A. I would not say. The distance between us and him would be about the distance between him and this one.

Q. That you stated in your examination was about three lengths of your boat?

A. Yes, sir.

Court: When you came to cross under the stern of the last barge?

A. Under the stern of the last barge, yes sir.

Q. In your statement I called your attention to the fact that you put her—

Mr. WISNER: Wait a moment. I object.

215 Mr. GOULDER: Wait until I ask the question.

Mr. WISNER: I object to his testimony being referred to.

Mr. GOULDER: I insist upon asking the question, and then you can object to your heart's content.

Q. In your testimony you put the Conemaugh a little more than a length off the channel bank, and you have her here much closer to the dotted line of the channel bank.

Court: I think that was shown in the direct examination.

Mr. GOULDER: It was, but the witness fixes it here somewhat different from his testimony-in-chief.

Court: The court makes allowance for the approximation of the testimony. In this testimony it is impossible for any man to stand on the deck of a vessel and say where the channel bank will be, unless it is concurrent with the shore line.

Witness: That was what I had reference to at the time I made that statement.

Q. What?

A. The shore. I could not say where the channel bank was.

Mr. GOULDER: Do you mean it was the distance from the shore bank?

Objected to as leading.

Q. State what you did mean.

Mr. WISNER: That is the way you avoid the leading rule.

Court: The witness has answered the question. He has stated what he meant in his direct examination, that when he said the channel bank he meant the shore line, as near as he could estimate it at night. Is that your understanding, Captain?

A. Yes, sir.

Mr. GOULDER:

Q. Now, I call your attention to where the Kasota piles are indicated on this map, in reference to the different sides of the river, and ask you how that appears to you there as compared with its appearance that night when you were navigating there.

A. It looks about right, I think, sir.

HUGH O. MILLER recalled.

Cross-examination.

Examined by Mr. WISNER:

Q. Whom have you talked with about your testimony in this case since you left the witness stand?

216 A. I have talked with Mr. Goulder a few minutes ago in that room, and there is where he had the chart there and

those models, and I saw that chart and those models this morning, somewhere about half past nine, I think it was.

Q. Did you use them on the chart as you have here now?

A. Yes, sir.

Q. I want you to place those models, all of them, as near as — can, where the boats were when you blew the alarm signals.

Witness places the models.

A. Somewhere about in that position.

Q. You know the scale of this map, do you, 200 feet to the inch?

A. Yes.

Q. And you think the steamer New York passed the stern barges in that tow about 400 feet away from them?

A. At about the position they were at about the time that I sounded the alarm. I am not expressing it in feet. I am putting the position of them as they appeared to me at that time.

Q. You do not mean to testify, then, by placing these boats to the facts?

A. No, sir.

Q. You did not see the New York, as a fact, occupy that position in regard to these barges?

A. No, sir.

Q. You did not see the Conemaugh occupy that relative position with regard to the Ferguson?

A. The exact position?

Q. The exact position?

A. No, sir; I did not.

Q. Will you swear that the New York did not occupy that position to the Ferguson (referring to the models) when you blew the alarm?

A. I am positive she did not.

Q. Are you positive she did not reach a position like that with regard to the Ferguson before the collision?

A. I don't think she did.

Q. Are you positive?

A. No, I am not positive, but it occurred to me she was over here about in that position, somewhere about those two barges, I think.

Q. You had blown her three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

217 Q. And she had not replied to you at all?

A. No.

Q. Why didn't you go down on the port side of her when you saw the boats in that position?

A. Having signified my intention, I concluded it was my best policy to hang on to the course I was on.

Q. You were bound to keep your course, were you?

A. I would have crossed his course if he had kept on as he was at the time of blowing those whistles.

Q. What change of course did the New York make that was not necessary for her to make to come by those barges?

A. I don't know, sir. I was on my own boat at that time.

Q. You don't know that she made any change of course that was not necessary for her to make for that purpose, do you?

A. I do not.

Q. And the only reason you can give for not porting and going down on her port side, at the time when the boats were in the position that you have placed them, is that you had blown two whistles?

A. Yes, sir.

Q. And you thought you must keep the course you indicated by those two whistles?

A. Yes, sir.

Q. You knew you had the right to take either side of her, didn't you?

A. I supposed I had a right to hang on to that side of her, after I had signalled my intention.

Q. You were navigating under the theory you had the right to that side because you had whistled for that side?

A. Yes.

Q. I want to go back a little further with the question and ask you to please state to the court what change of course from the time you first saw the New York, until the boats were in collision, the New York made that was not necessary to take her safely by those barges.

A. That I could not say.

Q. You don't say that she made any, do you?

A. That was not necessary to take her clear of the barges?

Q. When the boats were in that position, what did you expect the New York to do?

A. I expected him to come out here.

Q. Did you expect him to starboard and go across the stern of that barge?

A. Under the stern of the barge; yes, sir.

218 Q. And leave you room to go down on his starboard side?

A. Yes, sir.

Q. You understood it was his duty to do that, did you?

A. Yes, sir.

Q. Because you had blown him two whistles?

A. Yes, sir.

Q. Did you state, or do you recollect, without regard to what you have stated heretofore, that the New York seemed to have starboarded just before the collision?

A. I don't think I did, sir.

Q. Did she?

A. I couldn't say whether she did or did not.

Q. Do you know where your counsel got their information upon which they drew the libel in this case?

A. I can't say that I do, sir.

Q. Didn't they get it from you?

A. I don't know, I don't know, sir. I have not seen the libel, nor I don't know the manner in which it was drawn up.

Q. But you state now that you have no recollection that the New York did starboard and swing to port just before the collision?

A. No, sir.

Q. You have no recollection as to that?

A. No, sir.

Q. Then you can't recollect of any change in her heading until she struck you, from the time you passed the stern of the stern barge in tow?

A. No, sir; I cannot.

Q. Did you expect the New York to stop?

A. No, sir.

Q. Did you expect her to check?

A. No, sir.

Q. You knew she had no duty to stop or check?

A. Unless the captain saw fit to do so.

Q. But your whistle to him indicated no such obligation in your judgment?

A. It did not, sir.

Q. After you blew the alarm, with the boats in the position in which you had placed them, was there time for either boat to stop her engine before the collision?

A. Oh, I suppose there was. I think there was.

Q. You think each ship might have stopped?

A. I think so.

Q. But neither one did stop?

A. Not that I am aware of.

Q. You did not stop?

219 A. I did not.

Q. Was there at that time, when the boats were in the position in which you have placed them now, when the alarm was blown, up to the time of the collision, time to have stopped and backed the boats and prevent the collision by that means?

A. I could not say whether there was or not.

Q. In your judgment, what do you say about it?

A. I could not say as to that.

Q. You cannot express an opinion about it?

A. It would lessen their way certainly, but, I would not say that we would have, either of us, have altogether lost our headway.

Q. In your judgment, would the boats have come together?

A. By stopping and backing?

Q. By your stopping and backing at that instant?

A. That I could not say.

Q. Can't you give us your best judgment on it, or would you prefer to say you cannot pass judgment on it?

A. I cannot.

Q. Did you expect the New York to starboard her helm before she reached the stern of the last barge in tow?

A. I expected her, certainly, sir, to pass on our starboard hand at the same time.

Q. You expected, when she reached the proper point, whatever it was, that she would pass on your starboard side?

A. Yes, sir.

Q. You expected that, because you had blown her two whistles?

A. Yes, sir, and when I was blowing those whistles almost across her course.

Q. You had her on your starboard side?

A. Yes, sir.

Redirect.

Mr. GOULDER :

Q. When you blew this second whistle of two blasts, how nearly across her course were you then? What lights were you seeing?

A. The second?

Q. Yes.

A. Her headlights and two side lights.

Q. When you blew your third signal, what lights did you see?

A. Her headlights and two side lights.

220 Q. And the change of course necessary to clear the barges, had what effect?

A. To shut out the green light.

Q. When she got up here on that changed course between those two barges, what, if anything, was there in that river that night, to prevent her coming back on a starboard helm to the line of her original course?

A. I saw nothing.

COURT: What barges do you mean?

WITNESS: I mean the last two.

Mr. GOULDER :

Q. And after your third signal of two blasts, when you say you saw two colored lights, all three lights of that vessel, what was there, other than the porting of her helm and the changing of her course, which could have shut out that green light?

A. Not anything that I know of.

Q. You blew the alarm signal to the New York, did you?

A. I did, yes, sir.

Q. On the shutting out of that green light?

A. Yes, sir.

Q. To get over here to the place of collision you may state to the court whether the New York did or did not change the course she was on when you blew the second and the third signals of two blasts, enough or more than enough, in holding on up to that point, to clear that stern barge? I include in that the change of course and holding on until she came over here.

A. It was more than enough to clear the stern barge, but he put his wheel apart at that time to clear this one next to the last.

Q. And held on to that course as far as he could here, until it brought him over here to the point of collision, a little more than your length from the Canadian side?

A. That is the only way I know he got there.

Objected to as leading.

COURT: That is leading, Mr. Goulder.

Recross:

Q. Then it was the disappearance of the green light that induced you to blow the alarm, was it?

A. Yes, sir.

Q. Up to that time she had showed you continuously, then, both her side lights and her masthead lights?

A. From the time that I blow the second whistle the boat
221 waited until after I had blown the third, and when I blew the first two blasts to them I saw his red light and masthead light.

Q. Did it occur to you that the lights were kept in view because you were running across his course all the time?

A. Yes, sir.

Q. That was the reason they were kept in view?

A. Yes, sir.

Mr. Goulder offers in evidence photographs of the Conemaugh, showing the wound produced by the collision.

Libellant rests.

HARRY J. GREGG, sworn for libellant.

Oiler on Conemaugh, and was on watch with chief at time of collision. Conemaugh was under check; I heard signal to check; chief took the time. I felt shock of collision; I looked out and saw a conglomeration of lights and returned to the engine-room. Signal to stop a minute or less after collision. Before that had signal to go ahead strong and simultaneously with collision, and engine worked ahead strong a minute after collision.

J. S. LINDERMAN, sworn for libellant.

I am superintendent of Smith's coal dock and have been for two years. Down boats from Sandwich point take Canadian side until near Kasota piles, and when abreast our dock are near mid-channel. Boats round to at our dock every two hours. Up boats generally pass on American side of down boats. Current there $1\frac{1}{2}$ to 2 miles.

Cross-examination:

Am a sailor. Know current from appearance. Our dock 150 feet out from shore line. River there is $\frac{1}{2}$ mile wide. Seldom see down boats pass on American side; they take that side to avoid tows rounding to at our dock. Good water on both sides.

PAUL VERRAULT, sworn for libellant.

Foreman of Smith's coal dock. Was there at collision.
222 Heard Burlington blow Conemaugh. After Conemaugh answered Burlington she swung to Canadian shore. I heard two blasts two or three times and several short whistles. I saw the

New York coming up over a mile below when Conemaugh first blew to her. I heard no engine signal. New York was coming pretty lively, between eight and ten miles per hour. Usual course for down boats past dock to go on Canadian shore. Bound-up boats most of them go on American shore. Saw Conemaugh's colored and white lights, they were brightly burning. Collision about three lengths of Conemaugh above end of tow.

Cross-examination :

Collision between 7 and 8 p. m. I was on dock astern of Burlington, between her and dock—one-half mile I could see boats plainly. My judgment distance between Conemaugh and stern barge three lengths. My attention was called to boats. I could see last barge, but not her lights. That was my eye measurement at the time Conemaugh going towards Canadian shore as appeared from swing. Collision on opposite side of river, a little above the office, say 700 or 800 feet above where I stood. When Conemaugh blew two whistles to the New York she (New York) was a mile from Burlington's tow, and Conemaugh one-half mile from Burlington's tow.

JOSEPH W. JOHNSON, sworn for libellant.

On coal dock with Oscar Lawson at time of collision. Conemaugh blew check whistle and headed for Canadian shore. She blew three signals of two blasts to the New York, after that I heard a few short whistles. No answers from New York. Saw New York's red and bright lights. I watched her, but lost track of her light, as she turned towards the Canadian shore. New York near second or third barge when I lost red light. Nothing there to hide it. I saw red light again just before collision. New York coming pretty fast. I heard no engine signal on New York. Collision was about five lengths of Conemaugh above last barge in tow. I stood near Lawson. Could see green light of Ferguson. Saw Conemaugh's green light at collision, and saw bright light of New York and her red light. I stood near office, between Burlington and first barge. Conemaugh headed about three points to port of straight down river. New York kept up her speed as she came up. Her red light was shut out until half a minute before collision.

223 Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, in said district, on Monday, the thirty-first day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Present : The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTA- tion Company	} On Libel for Damages by Collision. In Ad- miralty.
vs.	
THE PROP. "NEW YORK," HER ENGINES, &c.	

This cause having been heretofore heard and submitted to the court for judgment, and the court having duly considered the same, and mature deliberation being had, it is now by the court ordered, adjudged and decreed, that the said propeller New York and the propeller Conemaugh were mutually in fault for the collision mentioned in the pleadings herein, and that the damages resulting from such collision be equally divided between said vessels. And that for the purpose of ascertaining such damages it is hereby referred to a commissioner of the circuit court of the United States for this district to ascertain and compute the amount of such damages and to report the same to this court with all convenient speed.

Afterwards, on the 18th day of November, A. D. 1892, a motion for a rehearing and notice was filed in said court and cause in the words and figures following :

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY	}
vs.	
THE PROPELLER "NEW YORK," HER ENGINES, ETC.	

Application for Rehearing.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan :

224 Now comes the libellant herein and moves the court for a rehearing of this cause, and a reargument upon the same for the following reasons and upon the points indicated below :

First. Your libellant proposes and asks leave to submit and argue the proposition that the inspector's rules, and especially rules three (3) and — (6), referred to in the opinion of the court, have no binding effect because the same were repealed and abrogated by the statute of 1885 (vol. 23 of statute, chapter 356).

Second. That the international rules adopted in 1885, govern the navigation of these vessels whether the law of the flag applies or the territorial law of the foreign waters in which they were navigated, and which were the locality of the tort.

Third. That signaling by these regulations being optional the omission of signals by the New York was not an indication that she did not see and hear the Conemaugh.

Fourth. Libellants wish and ask leave on the opening of decree to present testimony explicitly giving the time in which the engine of the Conemaugh could be reversed and made to back ; testimony

as to the effect of reversing the engine of the Conemaugh after the danger of collision became apparent, and also testimony of experts on the effect of altering the helm of the New York, stem-ing the current at rapid speed, and as to the movement and sheering of such a vessel in such circumstances, under the influence of her helm and of the current; and libellant advances, as a special reason for granting a rehearing, etc., that the circuit court of appeals for this circuit in a case decided at this term declined to use testimony taken on the appeal because of the strong doubt the court felt and expressed of the right to take such testimony under existing laws. So that unless the testimony is permitted to be taken as herein applied for, libellant is likely to lose the benefit of it entirely.

Fifth. Libellant desires to submit and have considered by the court in connection with the question whether the Conemaugh was *in extremis*, a decision for the circuit court of appeals for this circuit, rendered at the present term, bearing favorably to libellant upon the length of time preceeding the catastrophe during which an officer in charge may be deemed to be protected by that rule in a subsequent examination of his conduct.

Sixth. Libellant asks leave upon the foregoing points to present reasons and considerations for exonerating the Conemaugh upon the propositions that an attempt to reverse and the time after 225 the New York's green light closed would have been utterly futile and could have had no appreciable effect in mitigation or prevention of collision, and, second, that if any fault could have been committed it would be excusable because *in extremis*.

And your libellant thereupon prays leave of the court to file this application as a petition for a review and rehearing in this cause; and that the court will grant the prayer for such review and rehearing and will fix the time and direct the manner of taking such additional testimony.

H. D. GOULDER AND
SHAW & WRIGHT,
Proctors for Libellant.

Dated this 18th day of November, A. D. 1892.

Attached to the foregoing petition is a notice of which the following is a copy :

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY	}
vs.	
THE PROPELLER "NEW YORK," HER ENGINES, ETC.	}

SIRS: You will please take notice that upon the attached petition filed in the above cause, a motion will be made in accordance therewith before the Honorable Henry H. Swan, judge of said court, at the United States court-room, in the city of Detroit, Michigan, on the 5th day of December, A. D. 1892, at ten o'clock a. m., or as soon

thereafter as counsel can be heard, for an order setting aside the decree in said cause and providing for a rehearing and reargument therein according to the prayer of said petition.

H. D. GOULDER AND
SHAW & WRIGHT,

Proctors for Libellant.

To H. C. Wisner, Esq., and C. E. Kramer, Esq., proctors for claimant.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, in said district, on Friday, the third day of November, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION Company <i>vs.</i>	} On Libel for Col- lision. In Admi- ralty.
THE PROP. "NEW YORK," HER ENGINES, &c.	

This cause is now reargued by counsel for the respective parties and submitted to the court for judgment.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, in said district, on Thursday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION Company <i>vs.</i>	} On Libel for Col- lision. In Admi- ralty.
THE PROP. "NEW YORK," HER ENGINES, &c.	

This cause having been heretofore reargued and submitted to the court for judgment, and the court having taken time to consider said matter, and mature deliberation being had, it is now by the court ordered, adjudged and decreed that the interlocutory decree heretofore, on the thirty-first day of October, A. D. 1892, entered herein, be, and the same is hereby, vacated and set aside. And it is further ordered, adjudged and decreed that the said propeller "New York" was solely in fault for the collision and damage set forth in the libel filed herein, and that the libellant is entitled to recover its damages on occasion of said collision. And for the purpose of ascertaining such damages, and as well the damages of the intervening petitioners herein, it is further ordered that it be, and is hereby, referred to Darius J. Davidson, a commissioner of the circuit court of the United States for this district, to take proofs and to ascertain and compute such damages and to report the same to this court with all convenient speed,

Afterwards, and now on this 16th day of May, A. D. 1895, the opinion of the court was duly filed in said cause, in the words and figures following, to wit :

The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE STEAMER NEW YORK.

Messrs. Shaw & Wright and H. D. Goulder, for the Conemaugh.
C. E. Kremer, Esq., and H. C. Wisner, Esq., for the steamer New York.

Upon the hearing of this case, the court found both vessels at fault for the collision, and accordingly referred it to a master to ascertain and report the damages in the cause. The reasons given for that conclusion are stated in the case of the New York, 53 F. R., 553, and were reached, as there stated, with considerable doubt as to their correctness. A rehearing was had upon the petition of libellant and the matter was taken under advisement before the court. A careful re-examination of the testimony in the case, the admitted circumstances attending the collision and the rule of law applied by the Supreme Court of the United States, since the former decision of this cause, have satisfied me that in holding both vessels at fault, too harsh a judgment was passed upon the conduct of the master of the Conemaugh in holding that vessel in fault for the failure to stop and reverse, instead of going ahead at full speed in its efforts to escape the New York.

The answer and cross-libel filed by the owners of the New York says: " While passing under the stern of this barge (the Ferguson), and not more than ten or twenty feet from here, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than one hundred feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway 228 and swing clear under a hard-a-starboard helm." This admission was not called to the attention of the court at the first argument of the cause, and although it states the distance between the vessels at the time of the alarm signals by the Conemaugh, at less than that found by the court, its significance is—whatever that distance may have been—that at the time those alarm signals were sounded, the collision was confessedly inevitable. The New York was ascending the river at a speed of ten miles an hour. The Conemaugh was running at half that speed, and up to this time, had been navigated with great circumspection. When these signals were sounded the vessels were probably not to exceed 1,200 feet apart, and would cover that distance in less than one minute, and in so doing, the former finding of this court was that the proofs

"leave it at least doubtful whether the Conemaugh could have been stopped in time to avert the collision."

This conclusion—that is the doubt which it admits—requires under the latest decision of the Supreme Court, the acquittal of the Conemaugh.

As found in the former opinion, there would have been no collision had not the New York unlawfully changed her course upon being apprised of the proximity of the Conemaugh. This error superadded to the many and flagrant prior faults of the New York's navigation, should be held solely responsible for this collision.

In the case of the City of New York, 147 U. S., page 85, the language of Mr. Justice Brown, who delivered the opinion of the court, is most opposite to the facts of this case. He there says—speaking of the collision between a steamer and a sailing vessel: "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel, should be resolved in its favor." While this doctrine is not new, and many cases are cited in the opinion filed in this cause, expressing the same rule of judgment, it is an application of that rule under circumstances much less excusatory of the acquitted vessel than those which mark the collision in this cause. While it is true,

229 as stated in our former opinion herein, that the conditions preceding the New York's change of course, were preparatory and cautionary, and it was because of that fact that the Conemaugh was adjudged in fault for not stopping and reversing, in the light of all the circumstances and in view of the grossly negligent navigation of the New York when contrasted with the generally cautious management of the Conemaugh, and the perilous emergency in which the latter was placed by the wrong-doing of the New York, justice to the Conemaugh requires the application of the rule which I reluctantly declined to follow in the former opinion that where a vessel, which has been brought into immediate jeopardy by the fault of another, the injured party is not debarred from the recovery of damages if his vessel has done something wrong and has not been maneuvered with perfect skill and presence of mind. The proof of the Conemaugh's complicity in wrong-doing is not "clear and convincing" and she ought not to be held.

The case of the Alexander Folsom, 52 F. R., 403, is another instance of the application of the rule similar to that of the City of New York, 147 U. S., page 85, where the reasons for holding the error committed by one of the vessels in a collision as pardonable because *in extremis* were no more cogent than here.

This conclusion requires that the former decree in this cause be vacated and that a decree be entered herein, holding the New York

solely in fault for the collision, and that the reference heretofore ordered in this cause be proceeded with for the ascertainment of libellant's damages, including the damages suffered by the petitioners, who have intervened in the cause, and that the cross-libel of the owner of the New York be dismissed with costs.

(Signed)

HENRY H. SWAN,

District Judge.

Afterwards, on May 28th, 1895, respondent filed in said court and cause a motion in the words and figures following :

District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY }
vs.
PROPELLER NEW YORK. }

230 Now come the claimants of said steamer New-York, and move the court to vacate and set aside the interlocutory decree entered in this cause May 16th, 1895, and grant respondents leave to take its proofs within such reasonable time and at such places as to the court may seem proper, and also grant libellant leave to take further proofs as prayed for in the petition for rehearing, and in rebuttal of such proofs as respondent may introduce, as it may desire.

For the reason that the application for rehearing prayed for such rehearing and reargument, and for leave to put in further proofs, and the setting aside of the decree of Oct. 31st, 1892, had the effect to reopen said cause.

That in equity and justice respondents should have the right to introduce their proofs.

This motion is based on the files and records in this cause, and upon the affidavits filed herewith.

SCHUYLER & KREMER,
H. C. WISNER,

Respondents' Proctors.

District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY }
vs.
PROPELLER "NEW YORK." }

STATE OF MICHIGAN, { ss :
East. Dist. Mich., }

H. C. Wisner, being sworn, says he is one of the proctors for the respondent steamer New York, and has been such from the commencement of this suit.

That he was present at the final hearing from Feb'y 25, 1892, to and including March 2nd, 1892.

That at the close of libellant's proofs on that day, affiant, on behalf of respondent, moved the court to dismiss the libel, which motion was argued by counsel for both sides, and upon its conclusion the court announced that in his judgment both vessels were guilty of faults which brought about the collision; the New York particularly, because she did not regard the whistles of the Conemaugh.

Therefore, Mr. Kremer, and deponent, in view of the fact that the master of the New York did not reply to the Conemaugh's whistles, concluded to submit to the opinion of the court as he announced and refrain from introducing any proofs in behalf of respondents, and said case was so submitted on March 2, 1892.

At this time the practice in admiralty gave parties on appeal the absolute right to take proofs, and no intimation had been made by any authority that the act creating the court of appeals in any way restricted that right.

The decision of the court in this cause was delayed until Oct. 31st, 1892, was in accordance with the court's announcement at the hearing, that both vessels were at fault, and the opinion of the court filed, stating a conclusion of facts regarding the New York, which counsel for respondents did not consider warranted by the proofs, and which they believed could be removed in the mind of the court by a presentation of respondents' testimony.

On Nov. 18, 1892, libellant filed a petition for a rehearing and reargument of the cause, and especially for leave to put in new and further proofs.

Affiant was absent from the city from Nov. 17, 1892, until Dec. 24th. Upon his return and being notified of the filing of said petition he had a conversation with the judge of this court regarding the same. At such conversation affiant called attention to the recent decisions and rules of the courts of appeals, that no testimony could be taken on appeal when the party had neglected to take the same in the district, and said to said judge: "We do not ask for a rehearing, but under the circumstances, if your honor grants this petition, we desire to put in our proofs," to which the judge replied: "If I grant the petition you shall have an opportunity to do so."

Said petition for rehearing was argued Nov. 3rd, 1893, and held under consideration until May 16, 1895, when the same was granted to the extent of vacating the decree of Oct. 31st, 1892, but in lieu of granting leave to put in further proofs, as understood should be done and as prayed for in said petition, and in lieu of granting a rehearing as asked, and without any notice or suggestion to respondents' counsel or knowledge on their part that such was asked for or contemplated, an interlocutory decree was at once directed to be entered condemning the New York as wholly at fault for said collision.

Deponent further shows that the great delays which have occurred in the proceedings in this cause have in no way been requested by him, or due to his neglect.

Respondents are ready and desirous of introducing their testimony

in this case, and ask leave to do so within such reasonable time and at such place as the court may deem proper. That such testimony will be that of the master and crew of said steamer

232 New York, and in affiant's judgment, will establish the truth of the averments and allegations of the answer filed herein and refute the testimony of libellant's witnesses as to the conduct of the New York just prior to and at the time of the collision.

H. C. WISNER.

Subscribed and sworn to before me, this 28th day of May, A. D. 1895.

HERSCHEL WHITAKER,
U. S. Commissioner, East. Dist. Michigan.

STATE OF MICHIGAN, }
East. Dist. Mich., } ss.:

Charles E. Kremer, being sworn, says he is one of the proctors for the respondents, Steamer New York, and has been such from the commencement of the suit against her by the Erie & Western Transportation Company.

That he was present and participated in the trial of the case from Feb'y 25, to March 2, 1892.

That at the close of libellant's proof, Mr. Wisner, his associate proctor, moved to dismiss the libel, which motion was fully argued before the court by the proctors of both sides. That at the conclusion of the arguments the court announced that in his judgment both the steamers, Conemaugh and New York were at fault. Thereupon, affiant and Mr. Wisner concluded to submit the case upon libellant's showing and proof, and the court thereupon took the case under advisement on said day.

October 31st, 1892, the court found both steamers at fault.

A motion for rehearing, filed November 18, 1892, was argued by affiant on behalf of the New York, on the 3rd day of November, 1892.

At the time of said hearing, or immediately after the same, affiant stated to the court that in case the rehearing prayed for should be granted, that respondent would then ask leave to offer proof to sustain the allegations of the answer and refute some of the statements of witnesses as to the conduct of the New York, and the same statement was also made to Mr. Shaw, one of the libellant's proctors.

That on the 17th day of May, 1895, the court decided that its former decree made Oct. 31, 1892, be set aside, and another decree be entered finding the New York solely at fault for the collision. That this decree was entered without notice or knowledge to this affiant, or the respondent, or his associate in the cause.

CHARLES E. KREMER.

233 Subscribed and sworn to before me, this 28th day of May, A. D. 1895.

HERSCHEL WHITAKER,
U. S. Commissioner, East. Dist. Michigan.

STATE OF MICHIGAN, } ss :
 County of Wayne.

Fred C. Harvey, being duly sworn, deposes and says, that on the 28th day of May, 1895, he served copies of the foregoing motion, affidavits and a notice, of which the foregoing is a true copy, on Shaw & Wright, by handing the same to Herbert A. Wright, a member of said firm, personally.

FRED C. HARVEY.

Subscribed and sworn to before me, June 3rd, 1895.

CHAS. D. JOSLYN,
Notary Public, Wayne Co., Mich.

Afterwards, on the third day of June, A. D. 1895, certain affidavits were filed by libellant which were and are in the words and figures following, to wit :

District Court of the United States, for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY }
 vs.
 THE PROPELLER "NEW YORK." }

STATE OF MICHIGAN, } ss :
 Eastern District of Michigan,

John C. Shaw, being duly sworn, says that he is one of the proctors for the libellant, The Erie and Western Transportation Company, and has been such since the commencement of this suit. That he was present at the final hearing, February 25, 1892, to and including March 2, 1892.

At the conclusion of libellant's proof on said last-mentioned day Mr. Wisner, as proctor for the respondent, made a motion to dismiss the libel, and alleged that the libellant's proofs did not show that the New York was at fault, and further, that the Conemaugh was solely at fault. He argued for his contentions at great length, and at the close of the argument, in support of his motion, the

234 court said that he would not hear from the libellant but would deny the motion upon the ground that the court was satisfied that the New York had been clearly shown to be at fault, and to the best of deponent's recollection, the court then stated that while he was clearly satisfied that the New York was at fault upon the proofs as they then stood, he was not satisfied that the Conemaugh was not also at fault, and then, as counsel recollects, the respondent announced that they would rest, and thereafter, and preceding any presentation of the case on behalf of the libel, the court directed the attention of counsel to what in his mind at that time appeared to be a fault on the part of the Conemaugh, and stated substantially as follows : " If there is no objection, I will, before the argument is made, and for the guidance of counsel, indicate how this matter now lays in the mind of the court." And then, for the

apparent guidance of proctors in making their argument, he stated that he was satisfied that the New York was clearly at fault, and pointed out wherefore he was inclined to believe that the Conemaugh must also be condemned. Thereafter full arguments were had upon the question as to the fault of the Conemaugh, arguments being made upon that question by both proctors for the respondent as well as by those for the libellant. At the conclusion of those arguments the court announced that he would have to take time to decide the case, and arranged with counsel for filing briefs. Subsequently briefs were filed by both Messrs. Kremer and Wisner, as well as on behalf of the Conemaugh. Copies of both Messrs. Kremer's and Wisner's briefs so filed, are hereto attached, together with deponent's briefs in reply to the same.

Deponent has no knowledge nor information as regards the conversation claimed by Mr. Wisner to have taken place between him and the judge of this court on or about December 24, 1892.

Deponent further shows that a petition for a rehearing which was filed on November 18, 1892, was not heard in open court until Nov. 3, 1893. The date of hearing said petition was fixed to accommodate not only the proctors for the libellants but also Mr. Kremer, who there appeared as proctor for the respondent.

Further deponent shows that prior to the argument on said motion or petition for a rehearing and subsequent to the filing and service of the same, this deponent had a conversation with Mr. Kremer in which it was arranged that if the petition should be allowed, and a rehearing granted, the cause should be at once argued on its merits. At various times in conversation with Mr. Kremer, prior

235 to the argument which was had upon the rehearing, deponent understood from Mr. Kremer that they might make application to take testimony, if the libellant introduced further proofs. When a rehearing was granted we waived our request for the taking of further proofs, except so far as the introduction of the rules of navigation governing in Canada, and the taking of proofs as to the time that it would necessarily take to reverse and stop a vessel like the Conemaugh, when under headway, were waived for the purpose of avoiding delay, and so that the argument might then and there proceed upon the merits of the case. The counsel present for the respective parties at that time agreed that for the sake of the record a stipulation would be filed, providing they could agree, showing the time generally necessary for the manœuvre, and thereupon the court proceeded to hear the case upon its merits, and no offer or request to introduce evidence was made on behalf of the respondent. But at the conclusion of arguments as to whether the Conemaugh was or was not at fault, the case was submitted without reservation to this court for final judgment. Deponent has no recollection of Mr. Kremer having ever, either at the time of said hearing, or thereafter, stated that he would ask to put in proofs if a rehearing was granted. Such statement was made prior to said Nov. 3rd, 1893, but on the said last-mentioned day the rehearing was granted and thereupon counsel for the respondent did not make

any application for the privilege of taking proofs, but instead proceeded to an argument on the merits and submitted his case.

JOHN C. SHAW.

Subscribed and sworn to before me this 3rd day of June, 1895.

U. GRANT RACE,

Notary Public, Wayne Co., Mich.

District Court of the United States for the Eastern District of Michigan. In Admiralty.

ERIE AND WESTERN TRANSPORTATION COMPANY }
v.
THE PROPELLER NEW YORK. }

STATE OF MICHIGAN, }
East. Dist. of Mich., County of Wayne, } ss :

236 Harvey D. Goulder, being duly sworn, says that he is one of the proctors for libellant and has been such from the commencement of this suit, and as such was present and participated in the trial of this cause from February 25 to March 2, 1892.

That at the close of libellant's proofs, Mr. Wisner, in an argument of some length, sought to induce the court to dismiss the libel on the ground that no fault had, by the pleadings and libellant's proofs, been fixed and established against the propeller New York. The court without hearing from counsel for libellant overruled the motion, stating in doing so that the New York was clearly at fault, and that the only question for the court was whether the Conemaugh had been guilty of any negligence which contributed to the collision, the court intimating that he had some feeling that there was such fault. It is the best recollection of affiant that thereupon counsel in the New York, after consultation, announced that they would submit the case without introducing any proofs on their part. That a considerable number of witnesses said and represented to be the crew of the New York, among them, to the knowledge of affiant, the master of the New York, sat in court, and were present in court at that time. That the court stated that while he was clear the New York was in fault, he would, if there was no objection, state to the counsel on both sides how the matter lay in the mind of the court, without intending to anticipate at this time the discussion of the case by counsel, and that it lay in his mind that both vessels were at fault, and he would hear full argument from the counsel on both sides. That then the counsel for the New York stated in that connection in substance that the fault of the New York was clear, and that they did not regard it as worth while to take the time of the court by introducing the proofs on their behalf. The case was then argued at length by two counsel for libellant and two counsel for respondent. Subsequently typewritten briefs were filed, one each by the four counsel engaged in the case, and the case was by both parties submitted on the merits. After the original decision, counsel for the libellant filed a petition for rehearing for the reasons and

causes set up therein, and requested the right to introduce proof on certain specific points, and in that application called attention to the then recent decision of the circuit court of appeals, for this circuit, holding that no provision had been made in the law for taking testimony in the circuit — of appeals in appeal in admiralty. The motion stood until November, 1893, when counsel came together and the case was argued, the Canadian statute being presented.

237 Affiant says that it was certainly his understanding that the argument at that time was a full reargument of the entire case for counsel on both sides, and briefs were afterwards submitted by both sides covering the case generally. Affiant has no recollection of any claim, suggestion or intimation from counsel for the New York at any time that they desired to retract their former action and put in testimony in the case.

And further affiant saith not.

HARVEY D. GOULDER.

Subscribed and sworn to before me this 3rd day of June, A. D. 1895.

U. GRANT RACE,
Notary Public, Wayne County, Mich.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, in said district, on Monday, the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION Company	} On a Libel for Col- lision. In Ad- miralty.
vs.	
THE PROP. "NEW YORK," HER ENGINES, &C.	

The motion on behalf of claimants, to vacate the decree entered herein on May 16th, 1895, and for leave to introduce further testimony herein, having been heretofore argued and submitted to the court for judgment, and the court having taken time to consider of the same, and due deliberation being had, it is now by the court ordered, adjudged and decreed that said motion be, and the same is hereby, denied.

That afterwards, on June 26th, 1896, a motion was filed in said court and cause by respondent in the words and figures following, to wit:

238 United States District Court, Eastern District of Michigan.

ERIE & WESTERN TRANSPORTATION COMPANY, Libellant,)	
vs.	
PROPELLER NEW YORK,	}
and	
THE UNION STEAMBOAT COMPANY, Cross-libellant,	
vs.	
ERIE & WESTERN TRANSPORTATION COMPANY.	

Now comes said respondent and cross-libellant, The Union Steamboat Company, and moves the court to vacate the interlocutory decree against said respondent, and to receive and accept the depositions taken by respondent and cross-libellant on June 22d inst., and filed with the clerk of this court on June 26, 1896, as respondent's and cross-libellant's testimony in said cause.

For the reason- that :

1st. Respondent had no opportunity to put in his proofs after the granting of a rehearing of said cause, on application of libellant, before the entry of said decree.

2nd. No answer to the cross-libel in this cause has yet been filed by libellant.

This motion is based upon the depositions of John Vaughn, John O'Rourke and Joseph Howlett, taken before Herschel Whitaker, U. S. commissioner, on June 22, 1896, and filed in the clerk's office of this court on the 26th day of June inst. And upon the files and record entries of this court in said cause.

H. C. WISNER,
SCHUYLER & KREMER,
Proctors for Respondent and Cross-libellant.

Detroit, June 26, 1896.

To proctors for libellant :

Take notice : A motion, of which the foregoing is a copy, will be made to said court on Monday, June 29, 1896, at 10 o'clock a. m.

H. C. WISNER,
SCHUYLER & KREMER,
Proctors for Respondent and Cross-libellant.

239 Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, in said district, on Monday, the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present : The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION Company, Libellant,	} On Libel and Cross- libel. In Admi- rality.
vs.	
THE PROP. NEW YORK, HER ENGINES, &C., and	
THE UNION STEAMBOAT COMPANY, Cross- libellant,	
vs.	
THE ERIE AND WESTERN TRANSPORTATION Company.	

The motion of respondent and cross-libellant to vacate the decree heretofore rendered herein, and for the court to accept the depositions filed herein on June 26th, 1896, by said respondent and cross-libellant, is now argued and submitted to the court for judgment. And the same having been duly considered, it is now by the court ordered, adjudged and decreed that said motion be, and the same is hereby, denied; and exception to such order by respondent and cross-libellant specially noted. And it is further ordered that said depositions be, and they are hereby, stricken from the files.

Afterwards, at a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, in said district, on Friday, the third day of July, in the year of our Lord one thousand eight hundred and ninety-six.

240 Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION Company, Libellant,	} On Libel for Dam- ages for Collision. In Admiralty.
vs.	
THE PROPELLER "NEW YORK," HER EN- gines, &c.; The Union Steamboat Com- pany, Claimant & Respondent.	

On reading and filing the report of D. J. Davison, the commissioner to whom it was referred to ascertain and report the damages resulting from the collision in this cause, which report was filed on the 18th day of June, 1896, by which there is reported due to the libellant in its own behalf as owner and as trustee for the underwriters on the propeller Conemaugh, the sum of twenty-five thousand four hundred and twenty-four and $\frac{5}{100}$ dollars (\$25,424.55), including the cost of raising and repairing said propeller, together with the expenses incurred in and about the rescuing and caring for the cargo of said steamer; and that there is also due to said libellant, as trustee for the owners of and the underwriters on the cargo of said steamer, the further sum of thirty-two thousand eight hundred and ninety-one and $\frac{3}{100}$ dollars (\$32,891.03), exclusive of expenses incurred in and about the raising and saving of the said cargo, making the aggregate damages due to the said libellant in its own behalf and as trustee as aforesaid, the sum of (\$58,315.58); and on reading and filing the exceptions to said report, and after

hearing the arguments of counsel, and the same having been duly considered, and it appearing to the court that interest is equitably allowable on the amount of said damages for the period of three years and four months, it is therefore ordered, adjudged and decreed that said report be, and the same is hereby, modified so as to allow interest at the rate, and for the time aforesaid, and that said report be, in all other respects, ratified and confirmed as between the libellant and the claimant in this cause, and its surety on the bond or stipulation filed herein.

And it is further ordered, adjudged and decreed that the said Erie and Western Transportation Company in its own behalf and as trustee for the underwriters on said steamer Conemaugh, and as trustee for the parties interested in the cargo of said steamer, as owners or underwriters thereof, recover of the said Union Steam-

boat Company, claimant in this cause, the sum of sixty-nine
241 thousand nine hundred and seventy-eight and $\frac{91}{100}$ dollars (\$69,978.91), being the amount of the damages aforesaid, together with interest thereon at the rate of six per cent. per annum, for the period of three years and four months, and that the said libellant also recover its costs of suit to be taxed. And it further appearing that the said propeller New York was duly proceeded against *in rem* in this cause, and that she was thereafter duly bonded by the Union Steamboat Company, a corporation, as claimant and owner thereof, and the American Surety Company of the City of New York, a corporation, as surety, by their bond or stipulation, in the sum of seventy thousand dollars, conditioned to abide the decree of this court in this cause, on motion of John C. Shaw, proctor for the libellant, and F. H. and Geo. L. Canfield, proctors for the intervenors in said cause, it is further ordered, adjudged and decreed that judgment be, and the same is hereby, entered against the said Union Steamboat Company, claimant and the said American Surety Company of the City of New York, as surety, as aforesaid, for the aforesaid sum of \$69,978.91, with interest from the date of this decree, and costs of suit to be taxed.

And it is further ordered, that unless said damages, interest and costs be paid into the registry of this court, within ten days from this date that execution be issued against the said claimant and surety in due form therefor.

And it further appearing that the British and Foreign Marine Insurance Company, Limited, the Union Marine Insurance Company, Limited, the Marine Insurance Company, Limited, and the Insurance Company of North America, were insurers on portions of the cargo of the said steamer Conemaugh, which were lost or damaged by reason of the said collision, and that the same was duly abandoned to them by the owners thereof, and that they have intervened in this cause for the protection of their respective interests; and it also appearing to the court from the report of said commissioner that the damages resulting from said collision to said several insurers of said cargo, who have intervened as aforesaid, exclusive of expenses incurred by them in and about the salving and handling of the cargo, but including interest, is as follows, to wit: To

the British and Foreign Marine Insurance Company, Limited, the sum of two thousand one hundred fifty-eight and $\frac{7}{10}$ dollars (\$2,158.75).

To the said Union Marine Insurance Company, Limited, the sum of seven thousand four hundred eighty-three and $\frac{2}{10}$ dollars (\$7,483.20).

242 To the said Marine Insurance Company, Limited, the sum of eight hundred twenty-two and $\frac{4}{10}$ dollars (\$822.49); and to the said Insurance Company of North America the sum of six thousand six hundred seventy-nine and $\frac{3}{10}$ dollars (\$6,679.23).

It is therefore further ordered and decreed that out of the aforesaid sum of \$69,978.91, there be apportioned and paid to the said British and Foreign Marine Insurance Company, Limited, the said sum of \$2,158.75, with interest from the date of this decree.

To the said Union Marine Insurance Company, Limited, the said sum of \$7,483.20, with like interest.

To the said Marine Insurance Company, Limited, the said sum of \$822.49, with like interest; and to the said Insurance Company of North America, the said sum of \$6,679.23, with like interest.

And it appearing to the court that the salvage expenses incurred in raising and rescuing said steamer Conemaugh and her cargo, included in the aforesaid item of \$25,424.55, were contributed to by the several parties interested in said steamer and her cargo, including the intervenors aforesaid, and that they are entitled to share in the amount recovered by this decree on account of said item as between themselves on the principles of general average; it is therefore further ordered that the apportionment of said sum of \$25,424.55 and the interest thereon, between the said libellant as owner of said steamer and the said intervenors and others interested in said cargo, be reserved for the future determination of the court after the damages and interest awarded by this decree are paid into the registry of this court, or until the further order of the court.

Afterwards, on July 15th, 1896, a claim of appeal was filed in said court and cause by the claimant in the words and figures following, to wit:

243 District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY, Libellant,	}
and	
BRITISH FOREIGN INSURANCE COMPANY, LIMITED, INSURANCE	}
Company of North America, The Union Marine Insurance Com-	
pany, The Marine Insurance Company, Limited, Intervening	
Petitioners,	

vs.

THE PROPELLER NEW YORK, THE UNION STEAMBOAT COMPANY,	}
Claimant.	

Now comes The Union Steamboat Company, claimant of the propeller New York, by H. C. Wisner and Schuyler & Kremer, its

proctors, and feeling aggrieved by the final decree made in this cause July 3, 1896, does hereby appeal from so much thereof as finds the propeller New York in any way at fault for the collision between her and the steamer Conemaugh on October 21, 1891, and excepting therefrom the matter of damages except as to interest allowed, to the United States circuit court of appeals for the sixth circuit, and herewith presents its assignments of error, and asks that this appeal be allowed and that all the record and proceedings in said cause respecting the collision between the propellers New York and Conemaugh shall be duly certified to said court of appeals, and it hereby gives notice that it will apply to said court for leave to introduce proofs as to the merits of said cause in addition to the proofs now on file, and that it will make such new proofs.

H. C. WISNER,

SCHUYLER & KREMER,

Proctors for Union Steamboat Co., Appellant.

July 15th, 1896.

Afterwards, on July 15th, 1896, assignments of error were filed in said cause in the words and figures following, to wit :

244 District Court of the United States for the Eastern District of Michigan. In Admiralty.

ERIE & WESTERN TRANSPORTATION COMPANY, Libellant,	}
and	
BRITISH FOREIGN INSURANCE COMPANY, LIMITED; INSURANCE	
Company of North America, The Union Marine Insurance	
Company, The Marine Insurance Company, Limited, Inter-	}
vening Petitioners,	
<i>vs.</i>	
THE PROPELLER NEW YORK, THE UNION STEAMSHIP COMPANY,	}
Claimant.	

Assignment of Errors.

Now comes The Union Steamboat Company, by H. C. Wisner and Schuyler & Kremer, its proctors, and says that in the record and proceedings in said cause, and in the final decree entered therein, there is manifest error as follows :

1.

The district court erred in ordering an interlocutory decree on May 16, 1895, declaring the New York to have been solely at fault for the collision of October 21, 1891, without a rehearing of said cause, and an opportunity afforded respondents to put in their proofs.

2.

The court erred in overruling the motion of respondents to set aside said interlocutory decree and grant respondents permission to put in its proofs, made May 28, 1895.

3.

The district court erred in refusing respondents' application of June 26, to reopen said cause and accept the depositions of Vaughn, O'Rourke, and Howlett, filed that day.

4.

The court erred in finding that the New York changed her course just before the collision with the Conemaugh.

245

5.

The court erred in finding the New York at fault in any way for said collision.

6.

The court erred in not finding the Conemaugh wholly at fault for said collision.

7.

The court erred in not dismissing the libel in this cause.

8.

The court erred in awarding to libellant any damages against claimant and its surety in this case.

9.

The court erred in awarding libellant any interest in this cause. Wherefore appellant prays that said decree may be reversed and said libel dismissed, or for such other and further relief as shall be proper.

H. C. WISNER,
SCHUYLER & KREMER,
Proctors for Appellant.

Dated Detroit, Mich., July 15, 1896.

Afterwards, on the 15th day of July, A. D. 1896, a bond on appeal was duly filed in the words and figures following, to wit:

Know all men by these presents, that we, The Union Steamboat Company, a corporation existing under the laws of New York, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto The Erie & Western Transportation Company, The British & Foreign Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, in the sum of \$100,000, to be paid to them or to their successors and assigns in the manner and amount to each, as indicated by the final decree hereinafter referred to, to which payment we bind ourselves and our successors jointly and severally by these presents.

246 Dated this 11th day of July, A. D. 1896.

Whereas, the above-bounden Union Steamboat Company has appealed to the United States circuit court of appeals for the sixth circuit, from a decree of the district court of the United States

for the eastern district of Michigan, in admiralty, bearing date July 3rd, 1896, in a cause in which the said Erie & Western Transportation Company was libellant, and the said British & Foreign Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, are intervening petitioners, and The Union Steamboat Company was claimant of the propeller New York, and respondent :

Now, therefore, the condition of this obligation is such that if the above-named appellant, The Union Steamboat Company shall prosecute its appeal with effect and shall answer and pay all damages and costs which may be decreed against it, including just damages for delay and costs and interest on appeal, in case it fails to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue. And the parties obligors, hereto, do agree that, in case of appellant's failure to make good its plea, proper and just decrees may be entered against them as shall be directed by the court.

[SEAL.] By THE UNION STEAMBOAT COMPANY,
E. B. THOMAS, *President*.
AMERICAN SURETY COMPANY OF
NEW YORK,
[SEAL.] By DAVID B. SICKLES, *2d Vice-President*.
CORTLANDT S. VAN RENSSELAER,
Attorney.

I hereby approve the foregoing stipulation as security on appeal in this cause.

HENRY H. SWAN,
District Judge.

Detroit, July 15, 1896.

STATE OF NEW YORK, }
County of New York, } ss :

On this 13th day of July, 1896, before me personally appeared E. B. Thomas, president of the Union Steamboat Company, with whom I am personally acquainted, who, being by me duly sworn, said, that he resided in the city of New York; that he is the president of the Union Steamboat Company; that he knew the corporate seal of said company; that the seal affixed to the foregoing
247 instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority.

[SEAL.] A. L. TRAVIS,
Notary Public, Kings Co.

Certificate filed in New York Co.

STATE, CITY, AND COUNTY OF NEW YORK, ss :

On this 11th day of July, 1896, before me personally appeared David B. Sickels 2nd vice-president of the American Surety Com-

pany of New York, with whom I am personally acquainted, who, being by me duly sworn, said, that he resided in the city of New York; that he is the 2nd vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and that he signed said instrument as 2nd vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720 of the New York Session Laws of 1893. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said company; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of trustees, and in the presence of him, the said David B. Sickels, 2nd vice-president.

L. E. CARMAN,

[SEAL.]

Notary Public No. 19, New York County.

Cert's filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co.'s.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, on behalf of the company, in its business of guaranteeing the performance of contracts other
248 than insurance policies, and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

CITY AND COUNTY OF NEW YORK, ss :

—, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 11th day of July, 1896.

[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

24746, C. R. F.

United States District Court for the Eastern District of Michigan.
In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COM-
pany
vs.
PROPELLER NEW YORK
and
THE UNION STEAMBOAT COMPANY
vs.
PROPELLER CONEMAUGH, THE ERIE & WEST-
ern Transportation Co.

Cross-libel. Before
D. J. Davison, U.S.
Cir. Ct. Comm'r,
on Reference to As-
certain Damages.

It is hereby stipulated by and between the parties to the above causes that:

The proofs adduced by libellant on Oct. 23rd and 24th, 1895, at the hearing before said commissioner, of the loss and injury to the cargo of the steamer Conemaugh, by the collision with the New York, shall be deemed sufficient for the purposes offered, and shall be considered as received without objection.

249 And it is further stipulated that, in case the matter shall become material, either in this court or in the court of appeals, the loss suffered by the propeller New York in and by said collision, was the sum of \$3,391.19, and the date of such loss shall be considered as the 1st day of November, 1891.

SCHUYLER & KREMER,
H. C. WISNER,

Proctors for Steamer New York.

Detroit, Jan. 25, '95.

HARVEY D. GOULDER,
Proctor for Steamer Conemaugh.

F. H. & G. L. CANFIELD,
For Intervening Underwriters on Cargo.

District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY and INTER-
vening Petitioners, Appellees,
vs.
THE PROPELLER "NEW YORK," THE UNION STEAMBOAT COM-
pany, Claimant and Appellant.

Inasmuch as there is no question at issue as to the amount of damages awarded by the decree of the district court in this cause, or as to the right of the intervening insurance companies to share therein according to said decree, it is therefore hereby stipulated that in making return to the appeal in this cause, the clerk of the district court may omit from the transcript of the record all proceedings had in ascertaining the damages of libellant and intervening petitioners, except the stipulation of the parties which fixes

the amount of damages to the propeller "New York" by said collision.

And said district clerk may also omit from said transcript copies of the petitions of the intervening insurance companies and all orders made by said district court with reference thereto other than the final decree.

H. C. WISNER,

Proctor for Appellant.

JOHN C. SHAW,

Proctor for Libellant.

F. H. & G. L. CANFIELD,

Proctors for Intervening Insurance Companies.

July 22, '96.

250 Endorsed on the back: U. S. district court, eastern district of Michigan. In admiralty. The Erie & Western Transportation Company and Intervening Petitioners, appellees, v. The Propeller "New York," The Union Steamboat Company, claimant and appellant. Stipulation.

Calendar Entries.

THE ERIE AND WESTERN TRANSPORTATION Company vs. THE PROP. "NEW YORK," HER ENGINES, &C.	}	Collision. \$70,000.
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H. D. Goulder and Shaw & Wright, proctors for libellant.

H. C. Wisner and Schuyler & Kremer, proctors for claimant.

1891.

Nov. 11.—Libel filed, order for process made, day of hearing fixed for 1st Tuesday of December, 1891.

Nov. 11.—Attach. issued returnable 1st Tuesday Dec., 1891.

Nov. 21.—Stip'n to answer judg't in \$70,000 filed, The Union Steamboat Co., cl'm't, and The American Surety Co., of the City of New York, surety.

Nov. 21.—Writ of restitution issued.

Nov. 30.—Claim and appearance entered.

Nov. 30.—Attachm't returned served.

Dec. 14.—Answer filed.

1892.

Feb'y 25.—Cross-libel of Union Steamboat Co. v. Prop. Cone-maugh filed. Schuyler & Kremer, proctors.

Feb'y 25.—Order granting leave to file cross-libel.

Feb'y 25.—Hearing begun and case cont'd for further hearing.

Feb'y 26.—Hearing in progress and cont'd for further hearing.

Feb'y 27.—Hearing in progress and cont'd for further hearing.

Feb'y 29.—Hearing in progress and cont'd for further hearing.

March 1.—Hearing in progress and cont'd for further hearing.

March 2.—Hearing concluded and case submitted.

251 March 2.—Subpœna returned served.

Oct. 31.—Interlocutory decree entered finding the prop. New York and Conemaugh mutually in fault, with order of ref. to compute damages.

Nov. 18.—Motion for rehearing filed on behalf of libellant.

1893.

Nov. 3.—This cause is now re-argued by counsel for the respective parties and submitted.

1894.

May 26.—Order granting leave for British and Foreign Marine Ins. Co. to file petition to intervene.

May 26.—Petition to intervene filed. F. H. & Geo. L. Canfield, proct.

Oct. 8.—Order granting leave to Erie & Western Transportation Co. to intervene.

Oct. 8.—Petition of Erie & Western Transportation Co. filed. F. H. & Geo. L. Canfield, proctors.

Oct. 10.—Proof of service of notice of orders in Erie & West. Trans. Co. filed.

Oct. 24.—Answers of Union Steamboat Co. filed. Schuyler & Kremer, proctors.

Nov. 28.—Answer of Union Steamboat Co. filed. Schuyler & Kremer, proctors.

1895.

May 16.—Interlocutory decree heretofore entered herein, vacated and set aside, and interlocutory decree now entered finding prop. New York wholly in fault, with reference to compute, etc.

May 16.—Opinion of the court filed.

May 27.—Motion to set aside decree of May 16th heard in part and cont'd for further hearing.

May 28.—Motion to set aside decree with affidavits filed.

June 3.—Motion to set aside decree argued and submitted.

June 3.—Affidavits of Goulder and Shaw filed.

June 3.—Stipulation the Manhattan Ins. Co. and Mannheim Ins. Co. may file petitions filed.

June 10.—Order denying motion to vacate decree.

Aug. 6.—3 stipulations as to proofs in petitions by Ins. Cos. filed.

Aug. 26.—Amendment to petition of Ins. Co. of North America filed.

Oct. 21.—Notice of taking testimony filed.

Oct. 21.—Order granting leave to file amendments, &c.

1896.

March 24.—Petition of Marine Ins. Co. filed. F. H. & Geo. L. Canfield, proctors.

252 March 24.—Comm'r's report of damages filed.

April 1.—Order extending time to file exceptions to comm'r's report ten days, on application of John C. Shaw.

April 2.—Exceptions to comm'r's report filed by all Ins. Cos. intervening (4). F. H. & Geo. L. Canfield, proctors.

April 9.—Petition of John C. Shaw on behalf of libellant for reference filed.

April 10.—Exceptions to comm'r's report filed on behalf of libellant.

April 17.—Order re-referring case to comm'r for further proofs as to one item of damage.

May 15.—Aff't by Jas. G. Orr and Geo. L. McCurdy, and aff't of Jas. J. Whitlock filed by F. H. & Geo. L. Canfield.

June 18.—Comm'r's report of damages on re-reference filed.

June 26.—Depositions of John Vaughn, Joseph Howlett and John O'Rourke on behalf of respondent received and filed.

June 26.—Motion of respondent to vacate decree, filed.

June 27.—Exceptions to comm'r's report on re-reference filed by 4 Ins. Cos. F. H. & Geo. L. Canfield, proctors.

June 29.—Order denying motion to vacate decree, etc., denied, and to strike depositions from files.

July 3.—Final decree on comm'r's report.

July 15.—Claim of appeal filed.

July 15.—Bond on appeal filed.

July 15.—Assignment of errors filed.

July 15.—Order allowing appeal and directing transcript.

UNITED STATES OF AMERICA, } ss :
Sixth Judicial Circuit,

United States Circuit Court of Appeals for the Sixth Circuit.

To The Erie & Western Transportation Company, libellant, and British Foreign Insurance Co., Limited, Insurance Company of North America, The Union Marine Insurance Company, The Marine Insurance Company, Limited, intervening petitioners, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, 253 on the *first day of August, next, pursuant to an appeal filed in the clerk's office of the district court of the United States for the eastern district of Michigan, wherein The Union Steamboat Company, claimant of the propeller New York, is appellant, and you are appellees in error, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of July, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twenty-first.

HENRY H. SWAN,

District Judge.

* Not exceeding 30 days from the day of signing.

We hereby acknowledge service of the within citation.
Detroit, July 15th, 1896.

F. H. & G. L. CANFIELD,
Proctors for Intervening Petitioners.
JOHN C. SHAW,
Proctor for Libellant.

The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY, Libellant
and Appellee,

vs.

THE PROPELLER NEW YORK, HER ENGINES, &C., THE UNION
Steamboat Company, Claimant and Appellant.

EASTERN DISTRICT OF MICHIGAN, ss :

I, Darius J. Davison, clerk of the district court of the United States for the eastern district of Michigan, do hereby certify and return the foregoing to be a full and true transcript of so much of the record in the cause above entitled, as refers to the matter specified in the claim of appeal filed in said cause, and also a full and true transcript of the entire record and files in said cause, except the parts thereof specified in the stipulation of the parties
254 hereto, attached, and which are omitted in accordance with such stipulation ; that I have compared the same with the originals of record and on file in my office, and find it to be a true transcript of said originals and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, this thirty-first day of July, A. D. 1896.

[SEAL.]

D. J. DAVISON, *Clerk.*

255

Supplemental Record.

United States District Court for the Eastern District of Michigan.
In Admiralty.

ERIE & WESTERN TRANSPORTATION COMPANY, Libellant and In-
tervening Petitioners,

vs.

THE PROPELLER NEW YORK,

and

THE UNION STEAMBOAT COMPANY, Cross-libellant,

vs.

ERIE & WESTERN TRANSPORTATION COMPANY.

GENTLEMEN: You are hereby notified that the testimony of John Vaughn, Joseph Howlett and John O'Rourke, material witnesses for the above-named respondent and cross-libellant, and each of whom lives at a greater distance than one hundred miles from the place of trial of said cause, will be taken by deposition *de bene esse* before Herschel Whitaker, Esq., U. S. circuit court commissioner, at his office, No. 77 Moffat block, in the city of Detroit, on Monday, the 22nd day of June, 1896, commencing at 2 o'clock p. m., local time.

That such depositions are to be taken for use in support of a petition about to be made to said court for a rehearing of said cause,

and also to be offered in evidence at the rehearing of said cause, if granted, in this court, or at the hearing of said cause on appeal.

Yours, etc.,

SCHUYLER & KREMER,

H. C. WISNER,

Proctors for Respondent and Cross-libellant.

256 June 17, 1896.

To H. D. Goulder, Shaw & Wright, F. H. & G. L. Canfield, proctors for libellants and petitioners.

We admit service on us of the above notice.

F. H. & G. L. CANFIELD,

Proctors for Intervenors.

STATE OF MICHIGAN, }
County of Wayne, } ss :

H. W. Larkins, being duly sworn, says that on the 17th day of June, 1896, she served a notice, of which the foregoing is a true copy, on John C. Shaw, a member of the firm of Shaw & Wright, above named, personally, at his office in the city of Detroit.

H. W. LARKINS.

Subscribed and sworn to before me, June 22nd, 1896.

FRED C. HARVEY,

Notary Public, Wayne Co., Mich.

Endorsed on back :

STATE OF MICHIGAN, }
County of Wayne, } ss :

H. C. Wisner, being duly sworn, says that on the 17th day of June, 1896, he served a notice, of which the foregoing is a copy, on H. D. Goulder, within named, by depositing the same in the post-office at Detroit, in an envelope with postage prepaid and addressed to H. D. Goulder, at Cleveland, Ohio, that being his place of residence.

H. C. WISNER.

Subscribed and sworn to before me, June 27th, 1896.

FRED C. HARVEY,

Notary Public, Wayne Co., Mich.

U. S. District court, eastern dist. of Mich. Erie & Western Transportation Company v. The Propeller New York. On libel and cross-libel. Notice to take depositions. Schuyler & Kremer, H. C. Wisner, proctors.

257 UNITED STATES OF AMERICA, }
Eastern District of Michigan, } ss :

On this 22nd day of June, A. D. 1896, before me, Herschel Whitaker, a commissioner of the circuit court of the United States for the eastern district of Michigan, personally appeared at my office, No.

77 Moffat building, in the city of Detroit, John Vaughn, John O'Rourke and Joseph Howlett, witnesses on the part of the respondents and cross-libellants, in a certain cause of admiralty, civil and maritime, now pending and undetermined in the district court of the United States for the eastern district of Michigan, wherein The Erie and Western Transportation Company is libellant and The Steamer New York is respondent, and The Union Steamboat Company is cross-libellant, and The Erie & Western Transportation Company is respondent thereto, and in which cases The British & Foreign Insurance Company, The Union Marine Insurance Company and The Insurance Company of North America are intervening petitioners; and the said John Vaughn having been by me first cautioned and sworn to testify the whole truth, did testify as follows:

Q. What is your age?

A. 38.

Q. Where do you now reside?

A. In Buffalo, N. Y.

Q. What is your present business?

A. Master of the steamer Northern Queen.

Q. To whom does she belong?

A. To the Northern Steamship Co.

Q. What is her tonnage?

A. 1,885 tons.

Q. What was your business on the 21st day of October, 1891?

A. Master of the steamer New York.

Q. At that time how long had you been master?

A. Two years.

Q. What was the tonnage of the New York?

A. Something over 1,700 tons.

Q. At that time did you know the propeller Conemaugh?

A. Yes.

Q. Which was the largest boat?

A. The New York.

Q. On the evening of October 21st, 1891, were you navigating the Detroit river?

A. Yes, sir.

Q. Did you see the steamer Burlington that evening?

A. Yes, sir.

258 Q. Where?

A. Rounding to in the Detroit river.

Q. Which way were you bound?

A. Up.

Q. Was the Burlington above or below you?

A. Above.

Q. Did you exchange whistles with the Burlington?

A. Yes, sir.

Q. Where were you at that time in the river?

A. A little below Smith's coal dock.

Q. How much below, with reference to Fighting island?

A. About the head of Fighting island.

Q. What exchange of whistles did you have with the Burlington?

A. One. I blew him one whistle and he answered it; I checked down.

Q. Which of you blew the first whistle?

A. The Burlington blew the first whistle.

Q. And you answered him?

A. I answered him.

Q. And about where was the Burlington in the river at that time?

A. She was rounding to about the center of the river.

Q. What did you do with the New York upon answering that whistle?

A. Checked her down.

Q. How did you do that?

A. Signalled to the engineer.

Q. That was all you had to do with the checking, wasn't it?

A. That was all.

Q. Now, Captain, at this time, when you gave the checking signal, what could you see of the Burlington and her tow?

A. She was rounding to, and I was almost up abreast of the third last barge in the tow.

Q. Now, Captain, you have testified that when you answered the signal of the Burlington, you checked down?

A. Yes, sir.

Q. How soon did you check down?

A. Right away after I had given the signal.

Q. Were you up alongside of the third barge in the tow then at that time?

A. No, sir.

Q. Where were you?

A. I was below.

Q. At the time when you gave that checking signal, where
259 with reference to your boat, was the Burlington and her tow?

A. She was pretty near in the middle of the river, rounding to towards Smith's coal dock.

Q. And the barges were where?

A. They were well over towards the Canadian shore.

Q. Where was the New York then with reference to the tow?

A. A little above the head of Fighting island.

Q. How at that time did the barges bear from you?

A. Almost ahead.

Q. What lights on them could you see?

A. Red and green light.

Q. All of them?

A. The first two red lights and the last two red and green.

Q. How long did you continue on those relative course, with reference to the vessels?

A. Until I got abreast of the third last barge in the tow.

Q. What was done then by the New York?

A. I ported a little bit and then steadied.

Q. Did you see any change on the part of the barges at that time?

A. I was getting pretty well up to them at that time.

Q. Did you see any change in the lights shown by the barges at that time?

A. Yes, sir.

Q. Well, sir, what was it?

A. They shut out the green light and showed the red light.

Q. Were they not showing their red lights all the time up to that time?

A. Yes, sir.

Q. From the time you ported a little and then steadied, what was your course and the course of the barges as you moved through the water?

A. Almost parallel.

Q. And how far apart, as near as you can judge?

A. Somewhere between 60 and 70 feet.

Q. What was the condition of the atmosphere, as to being light or dark?

A. Dark.

Q. Could you see the Canadian shore line?

A. Well, yes, sir.

Q. As clearly as you could see it in the daytime?

A. No, sir.

Q. What was the condition? How dark was it?

260 A. Well, it was quite dark.

Q. Could you see the hull of a vessel half a mile away from you?

A. No, sir.

Q. Could you see the Burlington over at Smith's coal dock?

A. I could see her lights.

Q. Could you see the outlines of her hull?

A. I didn't look, sir.

Q. Well, if you had looked, in your judgment could you have seen them?

A. No, sir.

Q. As you were passing up by those barges, did you hear any signal from up the river of two blasts?

A. Yes, sir.

Q. Where were they?

A. Off on the port side.

Q. How did they bear from you, Captain, as near as you could tell?

A. They seemed to be a little forward of the beam.

Q. Where were you with reference to the barges when you heard those whistles?

A. About between the last two barges.

Q. Did you reply to that signal?

A. No, sir.

Q. At that time was there any vessel up the river ahead of you?

A. No, sir.

Q. Captain, why didn't you answer that signal?

A. I didn't think it was intended for me.

Q. Did you look in the direction from which the sound came?

A. Yes, sir.

Q. What did you see?

A. I didn't see anything but the tow I was passing.

Q. What were you doing yourself at that time?

A. I was watching the tow and Canadian shore so that when I got clear of the barges I couldn't straighten up the river.

Q. Did you know how far you were from the Canadian channel bank?

A. No, sir.

Q. Why not?

A. Well, it was dark, and I couldn't tell exactly, I thought I was as close as I could go with safety.

Q. Well, now, from that point, when you heard those two whistles which you didn't answer, just describe, please, what you heard, and what you did, and what you saw?

261 A. When I got up abreast of the last barge in the tow I put my wheel hard-a-starboard, just then I heard four or five short blasts of the whistle.

Q. Where from?

A. From the other side of the last barge in the tow. Just then a steamer shot across my bow and came into collision.

Q. How near were you from the last barge in the tow as you swung your starboard helm?

A. Not more than forty feet.

Q. How soon after the number of whistles you heard were the vessels in collision?

A. Almost immediately.

Q. What did you do when you heard those short whistles?

A. It was so quick after the whistles we came into collision that there couldn't be anything done to avoid a collision.

Q. Did you give any orders to the helmsman, or ring any bell to the engineer, and if so, what were they?

A. I gave the wheelsman the order to hard-a-starboard, and the engineer backing bells.

Q. Well, now, you stated a few moments ago that you had given the order hard-a-starboard when you reached the stern of the last barge?

A. Yes, sir.

Q. Did you repeat that order?

A. No, sir.

Q. Captain, did you keep a log as master of the New York?

A. Yes, sir.

Q. Look at the book I show you. In whose handwriting is that?

A. That's mine.

Q. When did you write the page I show you?

A. The 22nd of October.

Q. Where were you, or where was the New York rather?

A. She was in Lake Huron.

Q. After the collision, did you stop on your way north anywhere?

A. Yes, sir.

Q. Where?

A. Detroit.

Q. How long did you stay there?

A. About four hours.

Q. Whom did you see in Detroit to have any conference with?

262 A. Mr. Whiting.

Q. Who is he?

A. Agent for my company.

Q. This statement in this book you say is in your handwriting?

A. Yes, sir.

Q. Will you state why you wrote it?

A. Whatever lights I see or whatever passes I write it out on a tab or a piece of foolscap, and then copy it off the next morning, and whatever occurs.

Q. Did you make a memorandum of the facts written in this book on another piece of paper?

A. Yes, sir.

Q. When?

A. That same night.

Q. And while lying at the dock here in Detroit?

A. Yes, sir.

Counsel referring to a book endorsed on back "1891. New York. The U. S. Co. log. Master," and shown counsel for the libellant. Commencing 1891, April 29th, on first page, and ending December 13th, 1891. Showing witness book, he asks:

Q. Whose book is that, Captain?

A. The log book of the steamer New York.

Q. For what year?

A. 1891.

Q. And the handwriting under date Oct. 21 is whose?

A. Mine.

Mr. WISNER: Mr. Commissioner, I offer that book in evidence, and ask you to read to your stenographer that page down to the end of the collision.

Mr. CANFIELD: The Manheim Insurance Co. objects to the book being received as evidence, and objects to the pages referred to being received as evidence for the reason that the same is incompetent and irrelevant.

The exhibit offered is as follows:

Oct. 21. "Trip No. 12, west bound. '91. Abreast of Point Pelee at 2.29 p. m., dist. of the light $1\frac{1}{4}$ mile run by 20 M. then hauled W. by N. $\frac{1}{4}$ N. Log reg. 1.25 $\frac{1}{4}$ miles from Long point. Wind W. S. W. abreast of Colchester at 4.22 p. m. dist. of 1 mile. Log reg. 19 miles from Point Pelee. Abreast of Bar point at 5.39. Log. reg. 11 $\frac{3}{4}$ miles from Colchester. Abreast of Bois Blanc at 6.17. Over crossing at 6.34 p. m. In coming up Detroit river about abreast of Smith's

coal dock there was a large tow rounding to there which I blew one whistle to and also checked down at 7.45 p. m. The tow reached almost across the river. Before I got abreast of the last
 263 barge in tow I heard a prop. blow two whistles, but did not know whether it was to me or tow, and as I got abreast of last barge I had my wheel hard-a-starboard to straighten up the river. The prop. which proved to be the Conemaugh, blew 5 or 6 danger signals, but too late, as all the whistles in creation would not avoid a collision. She crossed our bows and we hit her on starboard side about abreast of her No. 1 gangway. I backed down clear of her; captain asked me if I would take his mate to Detroit, but afterwards said, Never mind, he would send her up on something else. She was away over on Canadian side of the river. Found out I was all right and not leaking. I went ahead full speed at 7.58 p. m."

Cross-examined in behalf of the Manheim Insurance Company.

By Mr. CANFIELD:

Q. When you stopped at the dock here in Detroit, did you see Mr. Whiting?

A. Yes, sir.

Q. Which Mr. Whiting?

A. Young Mr. Whiting.

Q. Do you remember his first name?

A. No, I do not.

Q. Did you make a statement to him of the facts relating to the collision?

A. Yes, sir.

Q. Was it in writing?

A. No, sir.

Q. Did Mr. Whiting take your statement down on paper?

A. No, sir.

Q. Did you at any time make a protest relating to this collision?

A. Yes, sir.

Q. Where?

A. They made it in Buffalo.

Q. Whom do you mean by they?

A. The company. They have a notary public there who looks after all that.

Q. Where were you while the protest was being made?

A. I misunderstood this question. The statement I meant.

Q. Who got up that statement?

A. I made it before the local inspectors in Milwaukee.

Q. Where is the protest which you spoke of having been made at Buffalo?

A. That I don't know.

264 Q. Is that the paper which you referred to as having been made at Buffalo by the company?

A. Yes, sir.

Q. Were you present when that paper, that protest, was gotten up at Buffalo?

A. No, sir.

Q. Did you sign it?

A. That I am not sure of.

Q. Were you sworn to it before a notary?

A. That I am not sure of.

Q. Did any other member of your crew sign it, or were they sworn to it before a notary?

A. Not that I know of.

Q. When was that paper, that protest, gotten up or made at Buffalo?

A. I don't know.

Q. How soon after the collision was it gotten up?

A. I don't know.

Q. Is your recollection about that paper as good as it is in regard to the circumstances connected with the collision itself?

A. No, sir.

Q. What was the name of the notary before whom the protest was made?

A. Well, Daniels is the company's notary.

Q. Is he the notary who made the protest?

A. I don't know who made it.

Q. In whose office was it prepared?

A. That I don't know.

Q. Were you present while it was being prepared?

A. I can't say.

Q. Have you ever seen it since it was prepared?

A. Not that I know of.

Q. Who prepared the report that was made to the local inspectors in Milwaukee?

A. I did.

Q. Where was that report prepared, and when?

A. It was prepared on my arrival in Milwaukee, in the inspector's office.

Q. Have you a copy of it here?

A. No, sir.

Q. Was your company furnished with a copy of that report?

A. No, sir; not that I know of.

Q. Were the affidavits of yourself, your officers and crew, in regard to the collision, taken soon after it occurred?

A. Yes, sir.

265 Q. Where and when?

A. At Milwaukee when I arrived there.

Q. By whom?

A. By Attorney Kremer.

Q. Mr. C. E. Kremer, one of the proctors in this suit?

A. Yes, sir.

Q. In the affidavit which you made at that time, did you set forth all the facts relating to the collision truly?

A. Yes, sir.

Q. And can you state whether the affidavits of the rest of the officers and crew also stated the facts truly?

A. Yes, sir.

Q. Do you know whether anything was omitted from those affidavits which would cast any light upon the collision?

A. No, sir.

Q. Do you remember when this case came on to be tried in the district court in Detroit?

A. Yes, sir.

Q. When did you last see those affidavits, or hear them read?

A. At the time of that suit.

Q. You mean at the time the case was being tried here in Detroit?

A. Yes, sir.

Q. And that was the last time you saw them or heard them read?

A. Yes, sir.

Q. Do you know where those affidavits are now?

A. I do not.

Q. Were you here in Detroit when that case came on to be tried?

A. Yes, sir.

Q. Were your officers and crew here also?

A. Yes, sir.

Q. How long were you here in Detroit before the case was called?

A. I can't say exactly. We were eight days here altogether.

Q. Where did you come from to Detroit at that time?

A. Buffalo, New York.

Q. Under whose direction or order?

A. Manager Bullard's.

Q. He is the manager of the Union Steamboat Company?

A. Yes, sir.

Q. Will you state, after you came to Detroit that time, the counsel who represented the Union Steamboat Company talked with you about the collision, and did you state to them the facts as you understood them to be?

A. Yes, sir.

Q. And the same is true, is it not, of all the witnesses that were brought here on behalf of the Union Steamboat Co.?

A. Yes, sir.

Q. I mean to ask you, Captain, whether these witnesses were all talked with fully?

A. Not that I know of.

Q. You talked fully with counsel, so far as your own testimony was concerned?

A. Yes, sir.

Q. And were you not present when counsel talked with the other witnesses before the trial commenced, or while it was going on?

A. No, sir, not altogether.

Q. Were you present while the most of them were being talked with?

A. No, sir, I can't say that I was.

Q. You talked with the counsel before the trial commenced?

A. I have talked with them every day more or less, but in what way do you mean?

Q. I mean in regard to the facts relating to the collision?

A. Not any more than just the facts were.

Q. So you told them truthfully just what the facts were, as far as they were within your knowledge?

A. Yes, sir.

Q. You and the other witnesses for the New York were in the court-room while the trial was going on?

A. Yes, sir.

Q. You were there all the time, or substantially all the time while the Conemaugh's witnesses were being examined, were you not?

A. Yes, sir, pretty near.

Q. And were you present while the case was being argued by counsel to the court?

A. No, sir.

Q. When did you first learn, Captain, that you were not to be sworn and examined as a witness before the court at that trial?

A. After all the other testimony was in.

Q. Who informed you?

A. That I ain't sure; one of the attorneys on the New York side.

Q. That is, if I understand you, after the testimony for
267 the Conemaugh was put in, you and the other witnesses for the New York were notified that their testimony would not be taken at the trial?

A. Yes, sir.

Q. What did you do then?

A. Went home then.

Q. And the other witnesses went with you?

A. Not all; they went in different directions.

Q. When did you first learn that it was finally concluded it would be best to take your testimony, and that it would be taken?

A. That's a question I won't swear to.

Q. When did you become master of the New York?

A. That same spring, 1891.

Q. What boat were you on before that?

A. The steamer Rochester.

Q. How long were you master of her?

A. Season of '90.

Q. All the season?

A. The last two trips.

Q. And before that what were you on?

A. Mate on various boats. The Jewett, New York, Portage, Rochester.

Q. And after leaving New York, what did you go on?

A. I went on the Northern Queen.

Q. In what capacity?

A. Mate.

Q. Did you ever sail for the Union Steamboat Co. after this collision?

A. No, sir.

Q. The New York, you said, was a vessel of about 1,700 tons?

A. Somewhere near that, about that.

Q. And the Conemaugh is about the same size, isn't she?

A. She is smaller, I think.

Q. She is upwards of 1,600 tons?

A. Yes, sir.

Q. How high is the top of the pilot-house of the New York, loaded as she was that night, above the water?

A. 18 or 20 feet.

Q. How high is the top of the Conemaugh's pilot-house above the water?

A. I don't know.

Q. Give us your judgment, you have seen her loaded; it would be about the same height, wouldn't it?

A. I don't think so, she was loaded deeper than we were.

268 Q. If they were light, would the tops of the pilot-houses be about the same above the water?

A. Well, yes.

Q. They are about the same style of boat, are they not?

A. No, sir.

Q. Wherein do they differ?

A. The Conemaugh is an arch boat, and the Conemaugh hasn't got arches.

Q. Do you know what the draught of the Conemaugh is when she is loaded?

A. That depends on the depth of water.

Q. About as usually loaded, what would be their draught?

A. About 15 and a half.

Q. And the New York as she was loaded that night?

A. Between 14 and 14 foot 6.

Q. So the pilot-house of the Conemaugh would be within a foot as high above the water as that of the New York?

A. Well, I can't say.

Q. Somewhere in that neighborhood?

A. Yes, sir.

Q. The top of the pilot-house is how many feet from the deck?

A. About seven feet.

Q. And the masthead light would be how far above the deck?

A. About forty feet, somewhere in that neighborhood.

Q. And the Conemaugh's about the same?

A. About that.

Q. How far above the water would the colored lights be?

A. About 15 feet.

Q. Besides the masthead light and the colored light, each steamer carried a stern light, did she not?

A. We carried one, I don't know whether the Conemaugh did or not.

Q. Do you know whether the Conemaugh carried a masthead light forward?

A. No, sir; I didn't see any.

Q. Did you see any bright lights on her?

A. Not until after we collided.

Q. Did you see any lights at any time on her before the collision?

A. Just at the time of the collision.

Q. What light then did you see.

A. Cabin lights.

Q. Which was first, the blow of the collision, or your view of those cabin lights?

269 A. About the same.

Q. You can't tell which was first?

A. No, sir.

Q. Which was first, your bell to your engineer, about which you have testified, or your view of the cabin lights?

A. It was at the same time.

Q. You can't tell which?

A. No, sir.

Q. How far off did those cabin lights seem to be?

A. Well, we went into collision at the time I saw them.

Q. Over which bow did you see them?

A. Almost ahead, or a little on the port bow.

Q. How long before that, if it was before that, I mean your seeing the cabin lights, was it that you gave the order to hard-a-starboard?

A. Just a minute before—a few seconds before.

Q. The signal of two whistles from a vessel coming down the river would mean that that vessel would pass an up-bound vessel, for whom the signal was intended, starboard side to starboard side?

A. Yes, sir.

Q. Was there any other vessel bound up at the time you heard that signal of two whistles to your knowledge, except the New York?

A. No, sir.

Q. Did you look to see whether there was any other vessel coming up, for whom that signal was intended?

A. I did look to see, I was looking all the time.

Q. I mean did you look to see whether there was any other vessel coming up besides the New York?

A. Yes, sir, and I didn't see none.

Q. Did you look to see whether there was any other vessel bound up in that neighborhood, after you heard the signal of two whistles?

A. Yes, sir.

Q. And you saw none?

A. No, sir.

Q. You knew, did you not, at that time, that that signal must have been given by some vessel bound down?

A. No.

Q. Did you see any vessel at all coming down the river?

A. Yes, sir.

Q. Whereabouts was that vessel, and what was she, if you know?

A. A tow rounding to.

Q. You refer to the Burlington?

A. Yes, sir.

270 Q. You testified on direct examination, if I am not mistaken, that those two whistles seemed to be a little forward of your beam?

A. Yes, sir.

Q. Can you say how much?

A. About half ways between abeam and dead ahead.

Q. That would be how many points forward of your beam?

A. About four points.

Q. How were you heading at that time?

A. Straight up and down the river.

Q. How did the Burlington bear from you at that time?

A. I wasn't watching the Burlington; that I can't say.

Q. Do you know whether she was over at Smith's coal dock at that time?

A. She should be pretty well over near there.

Q. What do you mean by that?

A. From the way her tow was, she should be pretty near over there.

Q. What do you mean by pretty near the coal dock?

A. From where her tow was and where she ought to be.

Q. How was her tow heading at that time?

A. We were running parallel with the last two barges and heading directly up the river.

Q. How soon after you received those two whistles did the collision occur?

A. Not a great while.

Q. What do you mean by that?

A. I couldn't say the length of time.

Q. At the time you heard those two whistles, did you notice the light on the Kasota piles?

A. No, sir.

Q. Did you see it at any time that night after you passed up?

A. Yes, sir.

Q. What do you mean, after you passed the light did you see it?

A. Going up the river after the collision.

Q. A bright light?

A. A small light.

Q. At the time you heard the two whistles did you notice the lights at Smith's coal dock?

A. Why, I see them, yes, sir.

Q. How did they bear from you?

A. They was almost abreast.

Q. Where, in reference to the coal dock, did the collision occur?

271 A. Just about a little below it.

Q. You know the size of any of those barges in that tow?

A. No, sir, I don't.

Q. You have told us about yourself. Who else was on the deck of the New York after leaving Fighting island?

A. Second mate, John O'Rourke.

Q. Who else?

A. Lookout, John Lane.

Q. Was the Burlington's light first seen by you?

A. Yes, sir.

Q. After leaving Fighting island until the collision, were any lights reported to you?

A. No, sir. I didn't hear any.

Q. Were any signals reported to you?

A. I can't say that; I heard one blast of the whistle myself.

Q. Who was on the pilot-house besides yourself?

A. No one.

Q. Sure?

A. On the pilot-house you mean?

Q. Yes, sir.

A. No, sir.

Q. Was there a bridge running from one bow to the other?

A. No, not at any time; she has it now.

Q. Was it dark when you entered the river?

A. Yes, sir.

Q. Did you pass any other vessels before you met the tow of the Conemaugh?

A. No, sir.

Q. Did you meet any?

A. No, sir.

Q. Where is your lookout?

A. At the present time? That I don't know.

Q. Was he in court at the time the case was tried?

A. Yes, sir.

Q. Was there any other vessels in the vicinity at the time of the collision besides the Burlington and her tow and the Conemaugh and the New York?

A. No, sir.

Q. No vessels lying along the Canadian shore, or near the Canadian shore?

A. I didn't see any.

Q. Did you see any white light near the Canadian shore?

A. Not near the Canadian shore.

272 Q. How soon after hearing those two whistles did you order your wheel hard-a-starboard?

A. Well, as to time I can't say, a short space of time.

Q. Was that the first order you gave to the wheel after hearing those two blasts?

A. Yes, sir.

Q. You have spoken of it as being a dark night. Were the stars shining?

A. I didn't see any stars.

Q. Was there any fog?

A. No, sir, there was no fog; there was haze, though.

- Q. That haze didn't obscure lights, did it?
 A. It made it hard to see.
 Q. You mean to say it was so near a fog that it obscured lights?
 A. Oh, no.
 Q. There was no difficulty in seeing lights, was there?
 A. No.
 Q. At what time did the moon rise that night?
 A. I don't know.
 Q. You say you couldn't see any stars?
 A. No, sir, I didn't look.
 Q. Have you any recollection whether the night was cloudy or whether it was clear overhead?
 A. It was partly cloudy.
 Q. Where were those clouds, on the horizon?
 A. That is a question I can't answer, I don't understand.
 Q. What is there about it you can't understand?
 A. I don't know what you mean by the question.
 Q. What part of the horizon did you see the clouds?
 A. Well, off to the eastward and westward.
 Q. Not overhead?
 A. Not that I know of; not that I see.
 Q. Isn't it a fact that you have no recollection about it?
 A. I see the clouds, I am sure.
 Q. Where were you when you first saw the lights of the Burlington?
 A. Down about at the head of Fighting island.
 Q. How far is that below Smith's coal dock?
 A. Somewheres in the neighborhood of a mile.
 Q. You blew one whistle?
 A. Yes, sir.
 Q. Did you hear any answer to that?
 A. Yes, sir.
 Q. How did you have the Burlington's light, on which bow, that night?
 273 A. Port bow.
 Q. How much?
 A. She was just starting to round to.
 Q. I must repeat my question. How much was the Burlington's lights on your port bow at the time you blew that whistle?
 A. I don't understand exactly. She was rounding to.
 Q. You saw her red light?
 A. Yes, sir.
 Q. How much was that light on your port bow when you first saw it?
 A. About a point.
 Q. Was she rounding to?
 A. Yes, sir.
 Q. I mean when you saw that red light about a point on your port bow?
 A. Starting to round?
 Q. Just starting?

A. Yes, sir.

Q. Before that had you seen her green light?

A. No, sir.

Q. Then do you mean to say that the Burlington commenced to round to before you saw her red light?

A. Before I saw her red light; yes, sir.

Q. How far from you was she when she commenced to round to?

A. Well, that I can't say.

Q. You are familiar with the river? You know where you were with reference to Fighting island?

A. Yes, sir.

Q. You have told me how far Fighting island is from the coal dock. Now, why can't you tell me how far the Burlington was from you when you saw her red light?

A. About a mile, I should say.

Q. Had you seen any lights on her before you saw her red light?

A. I saw her bright light.

Q. How soon after seeing the bright light did you see the red light?

A. About the same time.

Q. Can you tell whether she had commenced to round to when you saw the bright light?

A. Yes, sir.

Q. You have said that no report was made to you from the time you saw the Burlington until the collision. State what occurred between you and the second mate and the lookout up to the time of the collision?

A. Didn't anything with regard to the steamboat.

274 Q. Did anything occur between you and them in regard to anything?

A. No, sir.

Q. Nothing was said?

A. No, sir.

Q. Where was your lookout when you last saw him, last heard from him?

A. He was down on the promenade deck forward.

Q. What became of him?

A. I suppose he is there yet.

Q. What do you mean by that?

A. I mean that at the time of the collision he was down forward at that time.

Q. You told me you don't know where he is now?

A. No, sir; I don't know where he is now.

Q. Where was he when you last heard from him?

A. The last I heard from him he was here in the court-room; is that what you mean, or the last I heard of him on the steamer?

Q. Have you ever heard from him since you last saw him in the court-room?

A. No, sir.

Q. Do you know whether any efforts have been made to find him since that date?

A. I do not.

Q. Do you know where his home is?

A. Yes, sir.

Q. Where is it?

A. Sarnia.

Q. Do you know what business he is in now?

A. No, sir.

JOHN F. VAUGHN.

Subscribed and sworn to before me this 22nd day of June, 1896.

HERSCHEL WHITAKER,

U. S. Circuit Court Commissioner, Eastern Dist. Mich.

JOHN O'ROURKE, having been by me first cautioned and sworn to testify the whole truth, did testify as follows:

Q. What is your age?

A. 30.

Q. What is your residence?

A. Cleveland, Ohio.

Q. What business are you in?

275 A. Working in a steel mill.

Q. Where were you on the evening of October 21st, 1891?

A. On the steamer New York.

Q. In what capacity?

A. Second mate.

Q. Where were you that evening at the time of the collision between the New York and Conemaugh?

A. I was on the steamer New York.

Q. Were you on watch?

A. Yes, sir.

Q. Where?

A. On deck, forward.

Q. What part of the deck?

A. Right up in the eyes of her.

Q. In what capacity?

A. I was on as lookout then.

Q. Anybody else there?

A. Yes, sir.

Q. Who?

A. The lookout, John Lane.

Q. Where was he?

A. He was standing alongside of me.

Q. Where was the captain?

A. Standing in front of the pilot-house.

Q. In going up the river, in the neighborhood of Fighting island, did you exchange whistles with any boat?

A. Yes, sir.

Q. Did you ascertain what boat it was?

A. The Burlington and tow rounding to.

Q. What lights did you see?

A. Red light and two bright lights.

Q. Where were the bright lights?

A. On the mast.

Q. What other lights did you see in that neighborhood?

A. Saw the lights of the tow.

Q. What light?

A. Saw the red and green.

Q. On all the tow?

A. Only on three of them.

Q. See any light on the other one?

A. Red light.

Q. What was your speed about when you exchanged signals with the Burlington?

A. About 11 miles an hour.

Q. Through the water, or by the land?

A. By the land.

276 Q. When you exchanged signals with the Burlington, do you know whether any change was made with your helm?

A. No, sir.

Q. Was there, or don't you know?

A. I don't know.

Q. With reference to the barges in the tow, how were you heading?

A. We were heading about on to the second last barge from the end.

Q. What was the first change made of that heading, can you tell, with reference to the barges?

A. When we got about abreast, or between the second and last tow, the captain ported a little, I heard him say that to the wheelman.

Q. What next?

A. Then said steady.

Q. Right after, after trying to obey those orders, what was the situation of the New York and the barges in the tow with reference to each other?

A. Why, going right up alongside and them coming down.

Q. On parallel courses?

A. Yes, sir.

Q. Up to that time had you heard any signals from a steamer up the river of two blasts?

A. Yes, sir, I heard the signal of a steamer blowing two blasts on our port bow.

Q. What did you do?

A. Told the captain.

Q. What did you tell the captain?

A. I said some fellow was blowing two whistles off our port bow.

Q. What did he say?

A. I heard him say nothing.

Q. Did you look in the direction from which those sounds came?

A. Just then I did.

Q. What did you see?

- A. Didn't see anything.
- Q. Were there any lights along the shore?
- A. Not as I know of.
- Q. See any lights up the river, above where you were?
- A. Yes, sir.
- Q. Where were they?
- A. Away up the river.
- Q. At that time, in your judgment, what was the speed of your boat?
- 277 A. Seven miles an hour.
- Q. Through the water or by the land?
- A. Through the water.
- Q. Describe your movement from that time with reference to the barges in the tow.
- A. When we were about pretty near the last barge in the tow we heard two whistles, kept on going, and just as we got to the stern of the last barge we heard four or five whistles, and the boat came right across our bow.
- Q. The first two whistles that you heard, were they different from the two whistles you have just been testifying about, or the same?
- A. Different in what respect, in sound?
- Q. I want to know whether they were the two whistles you have been testifying about or different whistles?
- A. I could not tell you.
- Q. How many signals of two blasts only did you hear that night from up the river?
- A. One.
- Q. What was the next signal you heard from up the river?
- A. Four or five was the next.
- Q. What, if anything, was done with your helm before or at the time you heard the number of whistles?
- A. The wheel was put a-starboard.
- Q. When was the wheel put a-starboard?
- A. Just as we got to the stern of the last barge in the tow.
- Q. Just before you got the alarm whistles or after?
- A. Before.
- Q. What was done with your helm then?
- A. Put hard-a-starboard.
- Q. How do you know it was put hard-a-starboard?
- A. I heard the captain holler hard-a-starboard, holler it two or three times.
- Q. Two or three times before the collision?
- A. Yes, sir.
- Q. Two or three times before the alarm signal was blown?
- A. Yes, sir.
- Q. Did you notice any change in the direction of the New York by following that order?
- A. Yes, sir, she started to swing.
- Q. How far were you from the rear barge of that tow?
- A. In my judgment between 50 and 100 feet.

Q. When that alarm was blown, where was the steamer which blew the alarm with reference to the tow?

A. It was right astern of it.

278 Q. And about how much of an interval before she showed up by the stern?

A. About the same time.

Q. And how much of an interval before the two boats were in collision after that alarm was given?

A. A short space of time.

Q. Between the alarm and the collision were any signals given on your boat of any kind?

A. Just as we hit her the captain pulled the bells to back up.

Q. Pulled the backing bells?

A. Yes, sir.

Q. How soon after the captain gave the backing signal were the boats in collision?

A. At the same time, about.

Q. At the ordinary gait of walking, how far could a man have walked, in your judgment, between the alarm signals and the collision, on the deck of a boat?

A. I don't know, I run.

Q. Where did you run?

A. I run back.

Q. When did you commence to run?

A. Just as soon as I heard them whistles.

Q. How far did you get before they struck?

A. Just back of the cabin.

Q. Where was the cabin located with reference to the bow?

A. Thirty feet back.

Q. What kind of night was it?

A. Dark.

Q. As you passed along down there, what could you see on the Canada shore?

A. Could see the land.

Q. How did it appear to you?

A. Dark streak along.

Q. See any objects on the land?

A. Trees.

Q. Could you see people on there, if there were any?

A. No, sir.

Q. How far, in your judgment, were you from that shore land?

A. I couldn't tell you.

Q. Couldn't you form any judgment about it?

A. No, sir.

Cross-examination by Mr. CANFIELD:

Q. What time did the moon rise that night?

A. I didn't notice it.

279 Q. Was the night cloudy?

A. No.

Q. Any fog?

A. No, sir.

Q. Mist?

A. No, sir.

Q. Stars shining?

A. I could not say just now.

Q. Why?

A. I forget it.

Q. Did you see the light on the Kasota piles?

A. No, sir.

Q. Do you know whether one was burning there that night or not.

A. So long now I forget.

Q. Is there a good deal about this collision that you have forgotten?

A. No; except about the light and the kind of night it was. I remember everything that occurred.

Q. Did you meet and pass any vessels on your way up the river that night before you saw the Burlington?

A. There was one boat passed us between Bar point and Bois Blanc island.

Q. Which way was she bound and which side did she pass you?

A. She passed us on our starboard side up.

Q. You say you didn't meet any vessels coming down?

A. No; not that I know of.

Q. When did you go forward there as lookout?

A. About 15 minutes after six.

Q. Is that the place where the second mate generally goes?

A. Yes, sir; on that boat.

Q. How long had you been second mate of her?

A. Since that spring, that season.

Q. Did you report the Burlington?

A. Yes, sir.

Q. What report did you make?

A. By singing out to the captain that there was some fellow rounding to up there.

Q. What did the captain reply?

A. All right.

Q. You have said it was a clear night; how far could you see the hull of a vessel that night?

A. See it pretty near two miles.

Q. I mean without lights.

A. Yes, sir.

Q. Just before you heard that signal of two whistles in what direction were you looking?

280 A. Looking ahead.

Q. Do you mean directly ahead of over either bow?

A. Pretty near ahead.

Q. You hadn't got quite to the last barge in the tow at that time?

A. Just pretty near the bow of the largest barge.

Q. Now you say pretty near the bow. What do you mean, 100 feet, or 200 feet, or 10 feet?

A. I wouldn't say 50 feet.

Q. What would you say?

A. Somewhere around 25 or 30 feet.

Q. How far did you pass from the bow?

A. Between 50 and 100 feet.

Q. And did you hear those two blasts of the whistle when your steamer and that barge were in those relative positions?

A. Yes, sir.

Q. You heard the two blasts of a whistle, reported it to the captain, then you heard an alarm of four or five whistles, and ran aft, and the collision occurred almost immediately. Now, how soon after hearing the two blasts did you hear the four or five blasts?

A. A pretty short time.

Q. How far apart were the two steamers when that alarm was sounded?

A. Not very far; well, I should say 75 feet apart.

Q. Did you see any lights on the Conemaugh?

A. Yes, sir.

Q. What were they?

A. Saw her head light and green light.

Q. Did you report those lights?

A. Yes, sir; I hollered once.

Q. What did you say when you hollered?

A. I hollered, There's a fellow there, we are into him, and then I run.

Q. The Conemaugh loomed up there about as big as you?

A. Pretty big.

Q. Besides the light on her, what did you see?

A. I hadn't time to look for anything else.

Q. Those were good, bright lights, weren't they?

A. Yes, sir.

Q. That masthead light was some 40 to 60 feet above the water, was it not?

A. I couldn't tell you how high it was.

Q. Give us your judgment.

A. About 40 feet above the water.

Q. How high was the deck-load of that stern barge above the water?

281 A. Pretty high, but I could not tell how high it was.

Q. About how high?

A. I couldn't tell you.

Q. How much lower than the top of the pilot-house of the New York was it?

A. 20 feet.

Q. How nearly across your bows was the Conemaugh when you first saw her, gave that alarm and ran back?

A. The stem was right across our bow then.

Q. How do you account for not seeing the Conemaugh sooner?

A. I couldn't tell you that.

Q. Assuming that the captain of the New York was on top of the pilot-house, are you able to give any explanation why he should not have seen the Conemaugh before her stem had crossed your bows?

A. I couldn't tell you anything about that.

Q. How much off your port bow were those two blasts?

A. About a point and a half, I should judge. (* See foot-note.) I should say two points and a half.

Q. And according to your best judgment, how far apart were the two steamers at that time?

A. I don't know, I didn't see her.

Q. If she was only a point and a half off your port bow, what was there to prevent a man from seeing her if he looked in the direction from which the sounds seem to come?

A. I don't know what would stop him from seeing her.

Q. As you were acting as lookout there, I suppose you walked back and forth across the deck?

A. Yes, sir.

Q. So you could see over either bows of the boat?

A. Sometimes.

*The addition and change in the deposition of the above answer thus marked was made by witness when it was read to him.

Q. While you were standing there you had a view of the whole width of the river, could see the lights on both shores?

A. Yes, sir.

Q. And just before the collision, how was it?

A. I was looking ahead then.

Q. Just before that you could see lights on both shores?

A. On Smith's coal dock.

Q. And you could see the lights on both shores?

A. Yes, sir.

Q. And you could see the Burlington and her tow out there?

282 A. Yes, sir, if there were any.

Q. I wish to ask you this question: What was there to prevent you from seeing the Conemaugh at any time after you exchanged whistles with the Burlington, up to the time she crossed your bows?

A. I couldn't tell you, I don't know what would hide her from our view.

Q. How far do you think the men on the Conemaugh could have seen the hull of the New York that night, if the New York had no lights, supposing they were keeping a sharp lookout?

A. I couldn't tell you that.

Q. I understood you to say a while ago the whole of the vessel could be seen that night two miles? What was there to prevent the men on the Conemaugh from seeing the hull of the New York?

A. I don't know.

Q. I believe you have already stated that you don't know of anything to prevent the Conemaugh being seen by the New York?

A. No, sir.

Redirect by Mr. WISNER:

Q. This collision took place about eight o'clock?

A. Yes, sir.

Q. You testify that you went on watch at 6.15?

A. Yes, sir.

Q. About entering the river?

A. Yes, sir.

Q. Had the sun gone down then?

A. Yes, sir.

Q. When you got up in the neighborhood of Smith's coal dock, on the opposite side of the course, did you look at the barges in tow of the Burlington?

A. Yes, sir.

Q. Did you know their names?

A. No, sir.

Q. How many masts did the stern barge have?

A. Two or three.

Q. Could you see how many she had?

A. I didn't count them.

Q. I didn't ask you that. I want you to answer the question I asked. You have testified that you could see two miles. I want to know if you could see to count the masts in the last barge of that tow?

A. I could see to count them, but I didn't count them.

Q. Could you see objects on the Canada shore?

A. Trees I could see.

283 Q. Could you see people?

A. No, sir.

Q. Could you see the fences?

A. I don't know.

Q. What do you think about it? Do you mean you can't recollect?

A. I don't know whether I could see them or not.

Q. Was it light enough to see them?

A. Yes, if it was not too far away.

Q. I asked you if you could see them from where you were, you know whether they were too far away or not?

A. I didn't notice any fences.

Q. Was it so light at the time of the collision that, in your judgment, a person standing on Smith's coal dock could see the accurate distance between two vessels over where the collision was?

A. No, sir.

Q. That is about half a mile away. What do you mean by saying then it was so light you could see two miles away?

A. I meant this way: If a boat was standing out in the middle of the river that I could see it.

Q. How far were you above the deck-load of those barges as you passed by?

A. They were pretty near as high as we were.

Q. You testified that from the sound of the whistles you heard

on the port side of the boat blowing them, was a point and a half on your port bow. Assuming a boat to have been a point and a half on your port bow, could you look right ahead without seeing her?

A. Yes, sir, right straight ahead.

(Mr. CANFIELD:)

Q. Had you ever sailed before being on the New York?

A. Yes.

Q. Have you ever sailed since?

A. No.

(Mr. WISNER:)

Q. How much experience have you had with a compass?

A. About two years.

Q. Can you box the compass?

A. Yes, sir.

Q. Can you box it backwards?

A. Yes.

Q. How many degrees are there in a point of the compass?

A. I don't know.

JOHN O'ROURKE.

284 Subscribed and sworn to before me, this 22nd day of June, A. D. 1896.

HERSCHEL WHITAKER,
U. S. Commissioner, Eastern Dist. Mich.

JOSEPH HOWLETT, having been by me first cautioned and sworn to testify the whole truth, did testify as follows:

Q. What is your age?

A. 64 in August.

Q. Where do you reside?

A. In Buffalo.

Q. And you are a marine engineer?

A. Yes, sir.

Q. You recollect the collision between the Conemaugh and New York?

A. Yes, sir.

Q. Where were you on that occasion?

A. I was in the engine-room of the New York.

Q. How long had you been on watch?

A. About an hour and a half.

Q. What was your speed running up the river?

A. I think about ten miles and a half, somewhere along there. Ten miles, I guess.

Q. Do you take into consideration the current of the river?

A. Allowing a mile and a half for the current.

Q. Were you going ten or eleven miles through the water or by the land?

A. By the land.

Q. Do you recollect hearing whistles exchanged between the New York and the tow of barges that passed you?

A. I recollect one whistle.

Q. When you heard that exchange of one whistle, did you receive any signal from your captain?

A. Yes, sir, a checking bell.

Q. What did you do?

A. Checked down the engine.

Q. To what extent?

A. About five miles speed.

Q. Was that an understanding you had with the captain?

A. I had an understanding at the first check was to go about half speed and the next check was to check slow.

Q. Could you see out from your engine-room?

285 A. Yes, sir, I can see out on either side unless standing near the throttle.

Q. Can you see fore and aft?

A. No, on both sides.

Q. During the run up there you were at your engine?

A. Yes, sir.

Q. Tell us what you saw and what you heard in connection with the navigation of the barges and the New York and the boat you ran into, just in the order in which they happened.

A. I see a red light pass the gangway on the port side and I judged it to be very close to me, and I started to go to look out, go to the gangway, and I heard four or five whistles, and I thought there was something wrong, and I started back and got within about one step of the engine when I felt a jar, and about the time of the jar I got a backing signal.

Q. Did you notice particularly how near you were to that red light?

A. I couldn't exactly tell the feet, but I thought by the closeness with which we passed I thought it was 30 or 40 feet, but I couldn't tell how close we passed, I couldn't reach the gangway.

Q. Did you hear any whistles from another boat before that cluster of whistles you speak of?

A. I didn't notice any other whistles.

Q. How did those whistles come to you, how did they sound?

A. They sounded about as fast as they could be blown.

Q. How many of them were there?

A. I couldn't say that, there must be four or five, I couldn't say how many.

Q. And was there any interval between the first two and the balance?

A. No, they all seemed to be blown alike to me.

Q. Was there an interval of time between those whistles and the collision sufficient to have enabled you to get your engine backing?

A. No, sir.

Q. Was there, if you had received a backing signal at the same time you heard those whistles?

A. No, sir, I couldn't have got it backing.

Cross-examination by Mr. CANFIELD :

Q. How many revolutions does an engine make running at the speed you were running before you got the bell to check ?

A. It turns about 73.

286 Q. How many revolutions did she make after you got that signal ?

A. It turns about 40 or 45 a minute.

Q. Do you know how many turns your engine was making when you saw the red light of that barge ?

A. It is my opinion that she would loose about 30 from the time we checked until then ; I couldn't tell you.

Q. Do you know how many turns she was making when you got the signal to back ?

A. I should judge about 38 turns.

Q. Did you take any notice so as to know what you were making, or is it a mere matter of opinion ?

A. The register shows all the turns we make.

Q. Is it a mere matter of opinion as to how many turns you were making when you got the signal to back ?

A. It is.

Q. Did you get any signal to stop ?

A. No, sir.

Q. I understand that from the time you heard the one whistle to the tow, up to the time of the collision, you only received the one signal to check ?

A. That was all, sir.

JOS. HOWLETT.

Subscribed and sworn to before me this 22d of June, 1896.

HERSCHEL WHITAKER,

U. S. Commissioner, Eastern Dist. Mich.

UNITED STATES OF AMERICA,)
 Eastern District of Michigan, } ss :

I, Herschel Whitaker, a commissioner duly appointed by the circuit court of the United States for the eastern district of Michigan, do hereby certify that the reasons for taking the foregoing depositions is that the testimony of the witnesses aforesaid is necessary in the cause in the caption of said depositions named ; and that the said witnesses reside more than one hundred miles from the place of trial of said cause ; that proof of the notification of the taking of said depositions was made by notice, a copy of which, with proof of service thereof, to Messrs. Shaw & Wright, and H. D. Goulder, proctors for said libellant and respondent to cross-libel, and to Messrs. F. H. Canfield & G. L. Canfield, proctors for the intervening petitioners named, to be present at the taking of said depositions and put interrogatories if they might think fit.

287 That on the 22nd day of June, 1896, I was attended by Mr. John C. Shaw, one of said proctors for libellants, and by Mr. F. H. Canfield, one of the proctors for said petitioners, (both of

whom filed written objections to the taking of said depositions, and which said objections are hereto attached, marked Exhibits "A" and "B") and by said witnesses, and each of said witnesses was by me carefully examined and cautioned and sworn to testify the whole truth, and the testimony by each of them given was by me reduced to writing and thereafter read over to and subscribed by said witnesses named, in my presence and by me.

I further certify that I am not of counsel or attorney of either of the parties named, nor in any way interested in the event of the cause named in said caption.

Dated at Detroit, Michigan, June 24th, 1896.

[SEAL.]

HERSCHEL WHITAKER,
*U. S. Circuit Court Commissioner for the
Eastern District of Michigan.*

EXHIBIT "A."

United States District Court for the Eastern District of Michigan.
In Admiralty.

ERIE & WESTERN TRANSPORTATION COMPANY, Libellant and In-
tervening Petitioner, }

vs.

THE PROPELLER NEW YORK, }

and

THE UNION STEAMBOAT COMPANY, Cross-libellant, }

vs.

ERIE & WESTERN TRANSPORTATION COMPANY. }

GENTLEMEN: I appear specially for the libellant, under protest, and only for the purpose of making the following objections on its behalf:

First. I object to the notice given for the taking of depositions of John Vaughn, Joseph Howlett and John O'Rourke, before Herschel Whitaker, Esq., U. S. commissioner, as insufficient in both matter of time and form.

Second. I object to the taking of any depositions or testimony under notice given by Messrs. Schuyler & Kremer and H. C. Wisner, as proctors for the respondents and cross-libellants in this cause, which said notice is dated June 17, 1896, because the taking of such testimony or depositions is unwarranted, and is contrary to law and practice, and further, the taking thereof is objected to because the same is contrary to and in defiance of the special orders of the court duly entered in this cause.

Third. The taking of any depositions as proposed on behalf of the respondents and cross-libellant- is objected to because the same when taken are incompetent, irrelevant and immaterial, in this cause, and not entitled to be used as evidence therein.

I further hereby give notice that upon the filing of any depositions which may be taken pursuant to said notice, in either the dis-

trict court or the circuit court of appeals, the libellant will move to suppress and strike such depositions from the files and records in this cause, upon the grounds above stated, as well as for any further irregularities which may appear in the manner or form of taking, or in the contents or form of any such depositions when taken.

JOHN C. SHAW,
Proctor for Libellant.

Dated this 22nd day of June, A. D. 1896.

To Herschel Whitaker, Esq., U. S. commissioner, and to Schuyler & Kremer and H. C. Wisner, proctors for respondent and cross-libellant.

EXHIBIT "B."

Suit Pending in the District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY	}
<i>vs.</i>	
THE PROPELLER "NEW YORK," HER ENGINES, &C.	}

289 *Objections to Taking Depositions before Herschel Whitaker, June 22, 1896, Filed with said Commissioner by F. H. Canfield.*

In behalf of The British & Foreign Insurance Company, The Union Marine Insurance Company, and The Insurance Company of North America, intervenors in this cause, for whom I appeared for the purpose simply of making these objections, I object to the taking of the depositions of John Vaughn, John O'Rourke and Joseph Howlett, witnesses for the respondent, on the ground that the taking of said depositions is not authorized by law, or by any order, rule or practice of the court; and I give notice to the commissioner and to respondent's proctor, that if said depositions are taken, I shall object to their being filed in the cause, and that if they are filed I shall move that they be suppressed and stricken from the files for the reasons above stated.

June 22, 1896.

F. H. CANFIELD,
Proctor for Intervenor.

Endorsed on back: U. S. district court, eastern district of Michigan. In admiralty. The Erie & Western Transportation Company v. Propeller "New York," her engines, etc. Objections to taking depositions.

The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE AND WESTERN TRANSPORTATION COMPANY, Libellant, }
 vs. }
 THE PROPELLER NEW YORK, HER ENGINES, &C.; THE UNION }
 Steamboat Company, Claimant & Respondent.

I, Darius J. Davison, clerk of the district court of the United States, for the eastern district of Michigan, do hereby certify the above and foregoing to be the identical depositions, together with the certificate and seal of the commissioner, taking the same, thereto attached, which are referred to in the motion on behalf of claimant, to vacate the interlocutory decree against respondent, and to
 290 receive and accept said depositions as respondent's and cross-libellant's testimony in said causes; and also the identical depositions referred to in the order of said district court made and entered on June 29th, 1896.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 3rd day of August, A. D. 1896.

[SEAL.]

D. J. DAVISON, *Clerk*.

291 And afterwards, to wit, on August 24, 1896, an appearance was filed in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1895.

PROPELLER "NEW YORK"
 v.
 ERIE & WESTERN TRANSPORTATION CO. } No. 461.

To the clerk of said court:

Please enter my appearance as counsel for the appellant.

CHARLES E. KREMER.
 H. C. WISNER.

And afterwards, to wit, on August 29, 1896, an appearance was filed in said court in said cause, which is in the words and figures as follows:

Frank H. Canfield, George L. Canfield, counselors-at-law, Detroit, Michigan, 62 Moffat building.

Telephone 311.

DETROIT, MICH., August 28, 1896.

Frank O. Loveland, clerk U. S. circuit court of appeals, Cincinnati, O.

292 DEAR SIR: Yours of the 26th inst., with check for \$56 balance printing fund in the case of Davidson *et al.* v. Baldwin, was duly received.

Will you please enter my appearance in the case of Erie & Western Transportation Company and Intervening Petitioners *v.* The Propeller "New York," as counsel for the intervening petitioners. The interests of these intervenors is separate and distinct from that of the Erie & Western Transportation Company, the original libellant. Will you also send me copies of the record when it is printed?

Yours truly,

F. H. CANFIELD.

(Dictated.)

And afterwards, to wit, on October 13, 1896, a motion to admit certain depositions was filed in said court in said cause; which motion cannot be found in the files of said court.

And afterwards, to wit, on October 19, 1896, the affidavit of John C. Shaw, opposing said motion, was filed in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller
"New York," Appellant,

v.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Libellant
and Appellee, and The British and Foreign Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, Intervening Petitioners and Appellees.

293 UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

John C. Shaw, being first duly sworn, deposes and says that upon the close of arguments, on or about the 2nd day of March, 1892, District Judge Swan granted permission to proctors to file briefs therein, and that soon thereafter briefs were prepared and delivered to said district judge by or on behalf of each of the following proctors: H. C. Wisner, C. E. Kremer, H. D. Goulder, and this affiant; that after the briefs in behalf of respondent were delivered to said district judge, no copies thereof having been served upon affiant, the affiant did apply to said district judge for permission to take such briefs and copy the same for the purpose of preparing a reply thereto; that affiant did copy said briefs and reply thereto, and that he now has copies thereof.

That in such original brief by Mr. Wisner, which, affiant is informed, has since been returned to him, Mr. Wisner said: "The answer admits the failure of the 'New York' to hear the signals of the 'Conemaugh' or see her lights, and, as the 'Conemaugh' clearly proved the blowing of the signals (three separate 2-blasts) and the exhibition of proper lights, when she rested her case, we saw no reason for consuming further time by putting in testimony which

could only confirm those admissions, and also rested the case of the 'New York.'"

After some personal remarks directed at opposing counsel, he proceeded: "Our failure to put in proofs takes nothing from the strength of the 'Conemaugh's' proof, adds nothing to our charge of faulty navigation and violation of the rules of the road on her part as established by her libel and proofs, and certainly does not make, by its silence, that case against the 'New York' which she, as libellant, must affirmatively establish."

294 "At the close of the libellant's case we moved a dismissal of the libel upon the ground that the 'Conemaugh,' having the 'New York' on her starboard side, their courses crossing so as to involve risk of collision, it was the 'Conemaugh's' duty, under rule 19, to keep out of the way; the 'New York's' duty, under rule 23, to keep her course. Hence her failure to hear, see, and answer the 'Conemaugh' was immaterial, since it appeared she did maintain her speed and lawful course, and the collision was due to the failure of the 'Conemaugh' to keep out of the way."

That, further, since counsel for the appellant apparently disagrees with the proposition that there was a rehearing and re-argument on the merits and a second submission to the court for judgment on the 3rd day of November, 1893, the affiant has personally examined the court calendar and journal of the district court for the eastern district of Michigan, and in said calendar, under date of said 3rd day of November, 1893, is an entry in this case in the following words: "This cause is now re-argued by counsel for the respective parties and submitted."

Also in the said district court journal, in Volume L, at page 142, under date of November 3rd, 1893, is the following entry, to wit:

"THE ERIE & WESTERN TRANSPORTATION CO.	} On Libel for Col- lision. In Ad- miralty.
v.	
'NEW YORK,' HER ENGINES, ETC.	

This cause is now re-argued by counsel for the respective parties, and submitted to the court for judgment."

Further, that upon the hearing of respondent's first motion for permission to introduce proofs before District Judge Swan, on or about June 10th, 1895, said district judge stated in open court
295 that, while he would not contradict counsel's sworn statement that he so understood him, he had no recollection of ever having stated to counsel for respondent that the respondent might put in its proofs if it desired to and should the rehearing asked by libellant be granted.

JOHN C. SHAW.

Subscribed and sworn to before me this 19th day of October, A. D. 1896.

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

And afterwards, on the same day, to wit, on October 19, 1896, an order on said motion was entered upon the journal of said court, which is in the words and figures as follows:

United States Circuit Court of Appeal- for the Sixth Circuit.

THE PROPELLER "NEW YORK," ETC., }
v. }
ERIE & WESTERN TRANSPORTATION Co. }

This cause came on to be heard on a motion to admit certain depositions as a part of the record, and was argued by Mr. H. C. Wisner in support thereof and by Mr. John C. Shaw *contra*, and by order of the court said motion is hereby overruled.

And afterwards, to -it, on October 27th, 1896, a motion was filed in said court in said cause; which motion reads and is as follows:

296 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT Co., }
Appellant, }
v. }
THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Appellees. }

Now comes the appellee and moves the court for an order requiring that testimony of a witness may be taken to prove and establish the Canadian statute, which was in force for regulating the navigation of the waters of the province of Ontario at the time of the collision involved in this cause, and that a copy of such statute may be introduced in this cause.

This motion is based upon the records and files in this cause and upon the affidavits hereto attached.

H. D. GOULDER AND
JOHN C. SHAW,
Proctors for Appellees.

Dated at Detroit, Michigan, this 24th day of October, A. D. 1896.

To proctors for appellant:

Please take notice that a motion, of which the foregoing is a copy, will be made to said court at the opening thereof, or as soon as counsel may be heard, on Monday, November 22nd, 1896.

H. D. GOULDER.
JOHN C. SHAW.

297 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO.,
Appellant,
v.
THE ERIE AND WESTERN TRANSPORTATION COMPANY ET AL., Ap-
pellees.

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
County of Wayne.

John C. Shaw, being first duly sworn, deposes and says that:

In this cause the libel and answer, as well as the witnesses, place the collision in Canadian waters.

That in the printed record filed in this cause and court there is no copy of the Canadian statute governing navigation in said waters.

That such statute was introduced in this cause in the district court and used and referred to in the arguments upon the rehearing and re-argument of said cause before the district judge, on or about November 3rd, 1893.

That at that time the appellee (then libellant) offered to prove the Canadian statute by a barrister from the city of Windsor, in the province of Ontario, but it was then agreed in open court, between the proctor for the respondent, there present, and the proctors for the libellant, that the testimony of such witnesses might be dispensed with and the statute then in court might be used without technical proof thereof.

That said statute was then used upon the re-argument and treated as a part of the record.

298 That there was no stenographer present at that time, and it appears after a careful search of the printed record, filed in this cause by the appellant, on the 17th day of November, A. D. 1896, that no minute of such introduction and use of the Canadian statute was preserved, or at least found its way into the record.

That affiant believes this statute to be very material in the cause, and that the failure to have it appear in the printed record was due to no fault of the appellee or its proctors.

JOHN C. SHAW.

Subscribed and sworn to before me this 24th day of November, A. D. 1896.

JOSEPH H. CLARK,
Notary Public, Wayne County, Michigan.

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT Co., Ap-
pellant,
v.
THE ERIE AND WESTERN TRANSPORTATION COMPANY ET AL.,
Appellees.

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
County of Wayne,

Darius J. Davidson, being first duly sworn, deposes and says that he is the clerk of the United States district court for the eastern district of Michigan, and that he was clerk of said court on the 3rd day of November, A. D. 1893, and on that day was in attendance upon said court and heard most of the arguments of counsel upon the re-argument of the above case, which took place in said court on said day.

That he believes that the Canadian statute governing navigation in Canadian waters was then introduced by consent, but does not feel sure enough of his recollection to be positive as to that; but affiant does remember distinctly the effect of the Canadian statute was discussed, and it was read from and used in the arguments upon that occasion.

And further deponent saith not.

[SEAL.]

D. J. DAVIDSON.

Subscribed and sworn to before me this 24th day of October, A. D. 1896.

WALTER S. HARSHA,
Clerk U. S. Circuit Court, Eastern District of Michigan.

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT Co., }
Appellant,
v.
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., }
Appellees.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

Harvey D. Goulder, being first duly sworn, deposes and says that he has read the foregoing and attached affidavit made by John C. Shaw and knows the contents thereof, and that the facts therein stated are true.

And further he saith not.

Subscribed and sworn to before me this — day of November A. D. 1896.

And afterwards, to wit, on October 28th, 1896, an entry was made upon the journal of said court in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK" }
v. }
ERIE & WESTERN TRANSPORTATION CO. }

This cause is continued to and set for hearing at the December (1896) session of this court.

And afterwards, to wit, on November 9th, 1896, notice and proof of service were filed in said court in said cause, which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO., }
Appellant, }
v. }
301 THE ERIE & WESTERN TRANSPORTATION CO. ET AL., }
Appellees. }

Herbert K. Oakes, being duly sworn, deposes and says that he personally served on Wisner & Harvey, appellant's proctors, a copy of the within notice and motion by leaving same with F. C. Harvey, a member of the firm of Wisner & Harvey, at the office of Wisner & Harvey, in Detroit, Mich.

HERBERT K. OAKES.

Subscribed and sworn to before me this 2nd day of November, A. D. 1896.

JOSEPH H. CLARK,
Notary Public, Wayne County, Michigan.

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT }
Co., Appellant, }
v. } Motion.
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., }
Appellees. }

Now comes the appellee and moves the court for an order requiring that testimony of a witness may be taken to prove and establish the Canadian statute which was in force for regulating the navigation of the waters of the province of Ontario at the time of the collision involved in this cause, and that a copy of such statute may be introduced in this cause.

This motion is based upon the records and filed in this cause and upon the affidavits hereto attached.

302 Dated at Detroit, Michigan, this 21th day of October, A. D. 1896.

(Signed)

H. D. GOULDER AND
JOHN C. SHAW,
Proctors for Appellees.

To proctors for appellant :

Please take notice that a motion of which the foregoing is a copy will be made to said court at the opening thereof or on Monday, November 9th, 1896, or as soon thereafter as counsel can be heard.

Dated November 2nd, 1896.

H. D. GOULDER AND
JOHN C. SHAW,
Proctors for Appellees.

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK,"	THE UNION STEAMBOAT CO.,	}
Appellant,		
v.		
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL.,	Appel-	}
	lees.	

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss :
County of Wayne,

John C. Shaw, being first duly sworn, deposes and says that—

In this cause the libel and answer, as well as the witnesses, place the collision in Canadian waters.

That in the printed record filed in this cause and court there is no copy of the Canadian statute governing navigation in said waters.

303 That such statute was introduced in this cause in the district court, and used and referred to in the arguments upon the rehearing and re-argument of said cause before the district judge on or about November 3rd, 1893.

That at the time the appellee (then libellant) offered to prove the Canadian statute by a barrister from the city of Windsor, in the province of Ontario, but it was then agreed, in open court, between the proctor for the respondent there present and the proctors for the libellant, that the testimony of such witnesses might be dispensed with and the statute then in court might be used without technical proof thereof.

That said statute was then used upon the re-argument and treated as a part of the record.

That there was no stenographer present at that time, and it appears, after a careful search of the printed record filed in this cause by the appellant on the 17th day of October, A. D. 1896, that no minute of such introduction and use of the Canadian statute was preserved, or at least found its way into the record.

That affiant believes this statute to be very material in the cause,

and that the failure to have it appear in the printed record was due to no fault of the appellee or its proctors.

(Signed)

JOHN C. SHAW.

Subscribed and sworn to before me this 24th day of October, A. D. 1896.

(Signed)

JOSEPH H. CLARK,
Notary Public, Wayne County, Michigan.

304 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO.,	}
Appellant,	
v.	
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., Ap-	}
pellees.	

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

Harvey D. Goulder, being first duly sworn, deposes and says that he has read the foregoing and attached affidavit made by John C. Shaw and knows the contents thereof, and that the facts therein stated are true.

And further he saith not.

Subscribed and sworn to before me this — day of October, A. D. 1896.

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO.,	}
Appellant,	
v.	
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., Ap-	}
pellees.	

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
County of Wayne,

305 Darius J. Davison, being first duly sworn, deposes and says that he is clerk of the United States district court for the eastern district of Michigan, and that he was clerk of said court on the 3rd day of November, A. D. 1893, and on that day was in attendance upon said court and heard most of the arguments of counsel upon the re-argument of the above case which took place in said court on said day.

That he believes that the Canadian statute governing navigation in Canadian waters was then introduced by consent, but does not feel sure enough of his recollection to be positive as to that; but affiant does remember distinctly the effect of the Canadian statute

was discussed, and it was read from and used in the arguments upon that occasion.

And further deponent saith not.

[SEAL.]

(Signed)

DARIUS J. DAVISON.

Subscribed and sworn to before me this 24th day of October, A. D. 1896.

(Signed)

WALTER S. HARSHA,
*Clerk U. S. Circuit Court for Eastern
District of Michigan.*

And afterwards, on the same day, to wit, on November 9th, 1896, a motion suggesting diminution of record and for writ of certiorari was filed in said court in said cause, which reads and is as follows:

306 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO., }
Appellant,

v.

THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., Ap- }
pellees.

Now comes The Erie & Western Transportation Company, appellee, and suggests to the court that there has been a diminution of the record in this cause in that, among other things, the Canadian statute governing navigation in the waters where this collision occurred (out of which this action arises), which was introduced and used as evidence in the district court, does not appear in the record in this court, and moves the court that a writ of certiorari may issue to the district court for the eastern district of Michigan for the supplying of such evidence as does not appear in the record in this court.

This motion is based upon the records and files in this cause and affidavits.

H. D. GOULDER AND
JOHN C. SHAW,
Proctors for Appellee.

Dated November 8th, A. D. 1896.

And afterwards, to wit, on November 10th, 1896, an order upon said motion was entered upon the journal of said court in said cause, which order reads and is as follows:

307 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK,"	THE UNION STEAMBOAT CO.,	}
	Appellant,	
	v.	
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL.,	Ap-	}
	pellees.	

Upon motion of Mr. John C. Shaw, one of the proctors for the appellees, suggesting that there should be a diminution of the record in this case because the transcript of the record in this court does not contain a copy of the Canada statutes governing the navigation of vessels in the waters of Canada during the year 1891, which was introduced in evidence, as alleged, it is hereby ordered that a writ of certiorari issue directing the district court of the United States for the eastern district of Michigan to furnish a complete transcript of the record in this cause.

It is further ordered that the clerk of this court return the transcript of record filed in this cause to the said district court, together with the said writ.

And afterwards, to wit, on November 11th, 1896, a writ of certiorari issued out of said court in said cause, which is in the words and figures as follows:

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States of America to the honorable judge of the district court of the United States for the eastern district of Michigan:

308 Whereas there is now pending before us a suit in which the Propeller "New York" and The Union Steamboat Company are appellants and The Erie & Western Transportation Company *et al.*, are appellees, which suit was removed into this court by virtue of an appeal from the district court of the United States for the eastern district of Michigan, and whereas it has been suggested to this court that there is a diminution of the record in said cause because the transcript of record in this court does not contain a copy of the Canada statutes governing the navigation of vessels in the waters of Canada during the year 1891, which was introduced in evidence, as alleged, we, being willing that said omission or defect, if any, may be corrected, herewith return such transcript, and do command that under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said district court of the United States, to the United States circuit court of appeals for the sixth circuit, together with this writ forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of November, in the year of our Lord

one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.]

FRANK O. LOVELAND,

*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

And afterwards, to wit, on December 1st, 1896, the following return was made upon said writ, which reads and is as follows:

309 At a session of the district court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, in said district, on Monday, the thirtieth day of November, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Henry H. Swan, district judge.

THE ERIE & WESTERN TRANSPORTATION COM-	} On Libel for Collision. In Admiralty.
PANY	
v.	
THE PROP. "NEW YORK," HER ENGINES, ETC.	

Pursuant to the requirements of the writ of certiorari issued out of and under the seal of the United States circuit court of appeals for the sixth circuit, directed to the judge of the district court of the United States for this district, it is ordered that the clerk of this court transmit to the said circuit court of appeals a certified copy of the Canadian statutes governing the navigation of vessels in the waters of Canada during the year of 1891.

EXHIBIT "A."

Revised Statutes of Canada, 1886, vol. I, chap. 79.

An Act Respecting the Navigation of Canadian Waters, A. D. 1886.

Her Majesty, by and with the advice and consent of the senate and house of commons of Canada, enacts as follows:

310

Interpretation.

I. In this act, unless the context otherwise requires,

(a.) The expression "vessel" includes every description of vessel used in navigation;

(b.) The expression "ship" includes every description of vessel not propelled by oars;

(c.) The expression "steamship" or "steamboat" includes every vessel propelled wholly or in part by steam or by machinery or power other than sails or oars;

(d.) The expression "ordinary practice of seamen," as applied to any case, means and includes the ordinary practice of skilful and careful persons engaged in navigating the waters of Canada in like cases;

(e.) The expression "owner" includes the lessee or charterer of any vessel having the control of the navigation thereof. 43 V., c. 29, s. 3.

Regulations for Preventing Collisions.

(2.) The following rules with respect to lights, fog signals, steering and sailing and rafts, shall apply to all the rivers, lakes and other navigable waters within Canada, or within the jurisdiction of the Parliament thereof; that is to say:—

Preliminary.

Art. 1. In the following rules every steamship which is under sail and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules Concerning Lights.

Art. 2. The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

311 Art. 3. A steamship when under way shall carry—

(a.) On or in front of the foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass—so fixed as to throw the light ten points on each side of the ship, viz: from right ahead to two points abaft the beam on either side—and of such character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles;

(b.) On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass—so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c.) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass—so fixed as to throw the light from right ahead to two points abaft the beam on the port side—and of such a character as to be visible on a dark night, with a clear atmosphere, a distance of at least two miles.

(d.) The said green and red side lights shall be fitted with in-board screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. A steamship, when towing another ship, a raft or rafts, shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so

as to distinguish her from other steamships; each of these
 312 lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steamships are required to carry.

Art. 5. A ship, whether a steamship or a sailing ship, when employed either in laying or picking up a telegraph cable, or which from any accident is not under command, shall at night carry in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than three feet apart; and shall by day carry in a vertical line, one over the other, not less than three feet apart, in front of but not lower than her foremost head, three black balls or shapes, each two feet in diameter.

(a.) These shapes and lights are to be taken by approaching ships as signals that the ship using them is not under command, and cannot therefore get out of the way.

(b.) The above ships when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by article 3 for a steamship under way, with the exception of the white light, which she shall never carry.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side. To make the use of these portable lights

313 more certain and easy, the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.

Art. 8. A ship, whether a steamship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern, of not less than eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light visible all around the horizon, and at a distance of at least one mile.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

(a.) A pilot vessel, when not engaged on her station on pilotage duty, shall carry a light similar to those of other ships.

Art. 10. (a.) Open fishing boats and other open boats, when under way, shall not be obliged to carry the side lights required of other vessels, but every such boat, shall, in lieu thereof, have ready at hand a lantern with a green glass on one side and a red glass on

the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(b.) A fishing vessel, and an open boat, when at anchor, shall exhibit a bright white light;

(c.) A fishing vessel, when employed in drift-net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart.

314 (d.) A trawler at work shall carry on one of her masts two lights in a vertical line, one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also carry the side lights required for other vessels, or, if the side lights cannot be carried, have ready at hand the colored lights as provided in article 7, or a lantern with a red and a green glass as described in paragraph (a) of this article;

(e.) Fishing vessels and open boats shall not be prevented from using a flare-up light in addition if they desire so to do.

(f.) The lights mentioned in this article are substituted for those mentioned in the 12th, 13th and 14th articles of the convention between France and England scheduled to the "British sea-fisheries act, 1868;"

(g.) All lights required by this article, except side lights, shall be in globular lanterns, so constructed as to show all around the horizon.

Art. 11. A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, etc.

Art. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound shall not be intercepted by any obstruction, and also with an efficient bell. A sailing ship shall be provided with an efficient fog-horn to be sounded by a bellows or other mechanical means, and also with an efficient bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this article shall be used as follows: that is to say:—

(a.) A steamship under way shall make with her steam whistle or other steam sound signals at intervals of not more than
315 two minutes, a prolonged blast.

(b.) A sailing ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(c.) A steamship and a sailing ship, when not under way, shall, at intervals of not more than two minutes, ring the bell.

Speed of Ships to be Moderate in Fog, etc.

Art. 13. Every ship, whether a steamship or a sailing ship, shall, in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, that is to say:

(a.) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(b.) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(c.) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(d.) When both are running free with the wind on the same side, the ship which is to the windward, shall keep out of the way of the ship which is to the leeward.

(e.) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or 316 nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

(a.) This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

(b.) The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases, in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and, by night, to cases in which each ship is in such a position as to see both the side lights of the other.

(c.) It does not apply by day, to cases in which a ship sees another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or to where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

Art. 18. Every steamship, when approaching another ship, so as

to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

Art. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say :

One short blast to mean " I am directing my course to starboard ;"

Two short blasts to mean " I am directing my course to port ;"

Three short blasts to mean " I am going at full speed astern ;"

The use of these signals is optional ; but if they are used, the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of each ship.

Art. 22. When by the above rules one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

No ship under any circumstances is to neglect proper precautions.

Art. 24. Nothing in these rules shall exonerate any ship, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout or of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case.

318 *Reservation of Rules for Harbors and Inland Navigation.*

Art. 25. Nothing in these rules shall interfere with the operation of any special rule, duly made by local authority, relative to the navigation of any harbor, river or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

Rafts and Harbors of Sorel.

Art. 27. Rafts, while drifting or at anchor on any of the waters of Canada, shall have a bright fire kept burning on them from sunset to sunrise. Whenever any raft is going in the same direction as another which is ahead, the one shall be so navigated as not to come within twenty yards of the other, and every vessel meeting or overtaking a raft shall keep out of the way thereof. Rafts shall be so

navigated and anchored as not to cause any unnecessary impediment or obstruction to vessels navigating the same waters.

Art. 28. Unless it is otherwise directed by the harbor commissioner of Montreal, ships and vessels entering or leaving the harbor of Sorel shall take the port side, nothing in the preceding articles to the contrary notwithstanding.

Art. 29. The rules of navigation contained in articles 27 and 28, shall be subject to the provisions contained in articles 23 and 24, 43 v., c. 29, s. 2; 44 v., c. 21, s. 2; 49 v., c. 4, s. 2 and schedule.

319

Local By-laws, Penalties, etc.

3. No rule or by-law of the harbor commissioners of Montreal or the Trinity house of Quebec, or Quebec harbor commissioners or other local rule or by-law inconsistent with this act, shall be of any force or effect; but so far as it is not inconsistent with this act, any such rule or by-law made by the said harbor commissioners of Montreal or Trinity house of Quebec or Quebec harbor commissioners, or other competent local authority shall be of full force and effect within the locality to which it applies. 43 v., c. 29, s. 4.

4. All owners, masters and persons in charge of any ship, vessel or raft, shall obey the rules prescribed by this act, and shall not carry and exhibit any other lights or use any other fog signals than such as are required by the said rules; and in case of wilful default, such master, or person in charge, or such owner, if it appears that he was in fault, shall, for each occasion on which any of the said rules is violated, incur a penalty not exceeding two hundred dollars and not less than twenty dollars. 43 v., c. 29, s. 5.

5. If, in case of any collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary. 43 v., c. 29, s. 6.

6. If any damage to person or property, arises from the non-observance by any vessel or raft of any of the rules prescribed by this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft, or of the
320 deck of such vessel at the time, unless the contrary is proved, or it is shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary; and the owner of the vessel or raft, in all civil proceedings, and the master or person in charge as aforesaid, or the owner—if it appears that he was in fault—in all proceedings, civil or criminal, shall be subject to the legal consequences of such default. 43 v., c. 29, s. 7.

7. In any case or proceeding for damages arising out of a collision between two vessels, or a vessel and a raft, if both vessels, or both the vessel and the raft are found to have been in fault, the rules heretofore in force in the court of admiralty in England, and now

in Her Majesty's high court of justice, under the "supreme court of jurisdiction act, 1873," so far as they are at variance with the rules in force in the courts of common law, shall prevail, and the damages shall be borne equally by the two vessels, or the vessel and the raft, one-half by each. 43 v., c. 29, s. 8.

8. Unless herein otherwise provided, all penalties incurred under this act may be recovered in the name of Her Majesty, by any inspector of steamboats, or by any person aggrieved by any act, neglect or wilful omission by which the penalty is incurred, before any two justices of the peace, on the evidence of one credible witness; and in default of payment of such penalty, such justices may commit the offender to gaol for any term not exceeding three months, and, as except as hereinafter provided, all penalties recovered under this act, shall be paid over to the minister of finance and receiver general, and shall be by him placed at the credit of and shall form a part of the steamboat inspection fund: Provided always, that all penalties incurred for any offence, against this act shall, if such offence is committed within the jurisdiction of the Quebec harbor commissioners, or of the harbor commissioners of Montreal, be sued for, recovered, enforced and applied in like manner as
321 penalties imposed for the violation of the by-laws of the said harbor commissioners within whose jurisdiction the offence is committed. 43 v., c. 29, s. 9.

9. Whenever foreign ships are within Canadian waters, the rules for preventing collisions prescribed by this act, and all provisions of this act relating to such rules, or otherwise relating to collisions, shall apply to such foreign ships; and in any case arising in any court of justice in Canada, concerning matters happening within Canadian waters, foreign ships shall so far as regards such rules and provisions be treated as if they were British or Canadian ships: 43 v., c. 29, s. 11.

Duty of Masters ; Liability of Owners of Ships.

10. In every case of collision between two ships, the person in charge of each ship shall, if and so far as he can do so without danger to his own ship and crew, render to the other ship, her master crew and passengers, such assistance as is practicable, and as is necessary in order to save them from any danger caused by such collision; and shall also give to the master or other person in charge of the other ship, the name of his own ship and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound; and if he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default. 43 v., c. 29, s. 12, part.

11. Every master or person in charge of a British or Canadian ship, who fails, without reasonable cause, to render such assistance, or give such information as aforesaid, is guilty of a misdemeanor;

and if he is a certificated officer under Canadian authority, an inquiry into his conduct may be held, and his certificate may be canceled or suspended. 43 v., c. 29, s. 12, part.

12. The owners of any ship, whether British, Canadian or foreign, shall not, whenever all or any of the following events occur without their actual fault or privity, that is to say :

(a.) When any loss of life or personal injury is caused to any person being carried in such ship ;

(b.) When any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship ;

(c.) When any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person in any other ship or boat ;

(d.) When any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat—

Be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, nor in respect of loss or damage to ships, goods, merchandise or other things, whether there is in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships; and in the case of steamships the gross tonnage without deduction on account of engine-room.

2. In the case of any British or Canadian ship, such tonnage shall be the registered or gross tonnage, according to the British or Canadian law, and in the case of a foreign ship, which has been or can be measured according to British or Canadian law, the tonnage as ascertained by such measurement shall, for the purpose of this section, be deemed to be the tonnage of such ship.

3. In the case of any foreign ship which has not been and cannot be measured according to British or Canadian law, the deputy of the minister of marine shall, on receiving from or by direction of the court hearing the case, such evidence concerning the dimensions of the ship as it is found practicable to furnish, give a certificate under his hand, stating what would, in his opinion, have been the tonnage of such ship, if she had been duly measured according to Canadian law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship. 43 v., c. 29, s. 13.

13. Insurances effected against any or all of the events named in the section next preceding, and occurring without such actual fault or privity as therein mentioned, shall not be valid by reason of the nature of the risk. 43 v., c. 29, s. 14.

14. If Her Majesty, acting on the joint recommendation of the admiralty and the board of trade, by order in council annuls or modifies any of the regulations for preventing collisions on navigable waters, which, by order of Her Majesty in council of the fourteenth day of August, 1879, were substituted for those theretofore in

force for like purposes in the United Kingdom, or makes new regulations in addition thereto or in substitution therefor, the governor in council may, from time to time, make corresponding changes, as respects Canadian waters, in the regulations contained in the second section of this act or any that may be substituted for them,—or may suspend them or any of them, and make others in their stead,—or may revive all or any of the regulations in the act of Parliament of Canada passed in the thirty-first year of Her Majesty's reign and entitled "An act respecting the navigation of Canadian waters," as he deems best for insuring the correspondence of the regulations of Her Majesty in council with those of the governor in council. 44 v., c. 20, s. 2.

The District Court of the United States for the Eastern District of Michigan.

THE ERIE & WESTERN TRANSPORTATION COMPANY }

v.

THE PROP. "NEW YORK," HER ENGINES, ETC. }

EASTERN DISTRICT OF MICHIGAN, ss:

I, Darius J. Davison, clerk of the district court of the United States for the said district, do hereby certify and return, in obedience to the writ of certiorari hereto attached and the order of the district court of the United States for this district, also hereto attached, *I do hereby certify* that the papers hereto attached, marked "Exhibit A," is a true copy of the Revised Statutes of Canada, 1886, volume one, chapter seventy-nine, and entitled "An act respecting the navigation of Canadian waters, A. D. 1886;" that I have carefully compared the same with the original act as published and find the same to be a true copy of such original and of the whole thereof.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this thirtieth day of November, A. D. 1896.

D. J. DAVISON, Clerk.

And afterwards, to wit, on January 16th, 1897, a stipulation was filed in said court in said cause, which reads and is as follows:

325 United States Circuit Court of Appeals for the Sixth Circuit.
In Admiralty.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT CO.,
Appellant,

v.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Libellant;
The British Foreign Insurance Co. (Limited), The Insurance
Company of North America, The Union Marine Insurance
Company, and The Marine Insurance Company (Limited), In-
tervening Petitioners, Appellees.

The above appellant, libellant, and intervening petitioners, by their respective proctors, hereby stipulate and agree that the bill of

lading hereto attached, so far as its printed stipulations are concerned, is characteristic and illustrative of the bills of lading covering the cargo on board the steamer "Conemaugh" at the time of collision with the propeller "New York," from which this action arises.

It is further agreed that this stipulation and the attached bill of lading shall be printed by the clerk of this court, and the printed copies thereof filed in this court and cause for such use and effect as the court may give the conditions attending the shipments of said cargo, should the same become material.

Dated at Detroit this 7th day of November, A. D. 1896.

H. D. GOULDER,
JOHN C. SHAW,
Proctors for Libellant.

H. C. WISNER &
C. E. KREMER,
Proctors for "New York."

F. H. & G. L. CANFIELD,
For Intervenors.

326

Bill of Lading.

10171.

4303. 4-14-'91. 4000. Form No. 12—Foreign—Steam.

B. L. # 69. Eng. # 31. Con't # 127. J. F. Sickels.

The Erie & Western Transportation Co.

Anchor line, on the Great Lakes.

Lake connection of the Pennsylvania Railroad Company via Erie
or Buffalo, at carrier's option.

Atlantic transport line of British America.

Principal agencies.

J. C. Evans, agent, Chicago.
D. M. Brigham, agent, Milwaukee.
S. B. Gault, northwestern agent, St. Paul.
C. A. Clawson, agent, Minneapolis.
H. C. Shephard, " Winona.
O. J. Geer, general agent, New York.
T. C. Pollock, agent.
N. L. Walton, " Philada.
R. B. Granville, " Baltimore.

Shipped by L. C. Porter Milling Co. the following-described property in apparent good order, but weight, quality, value, contents and condition of contents unknown. To be carried or forwarded subject to all of the conditions hereinafter contained to the port of Baltimore, Md. (with liberty to the carrying ship to call at intermediate ports) and thence by Atlantic transport line of British steamers to the port of London, Eng. (or so near thereto as ship

may safely get with the privilege of calling at any usual port of call), and to be delivered in like good order, subject to said conditions, unto L. C. Porter Milling Co. or order or to their assigns (notify Chambers Bros.), upon payment immediately on discharge of the property, of the freight thereon, at the rate of thirty-four cents, American gold, per one hundred pounds, gross weight and advanced charges (\$—) with all other charges and average as hereinafter provided, without any allowance of credit or discount; one pound sterling to be considered equal to \$1.80 American gold.

327

Marks and numbers.	Articles and weight.
600 sacks flour. Cream of the West. L. C. Porter Milling Co. or order. Notify Chambers Bros., London, Eng.	600 sacks flour. Freight paid to Chicago. Said to weigh 84,000 lb.

1st. In accepting this bill of lading the shipper, owner, and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder.

2nd. The responsibility of each carrier is to be limited to its own line.

3rd. The said The Erie & Western Transportation Company shall not, nor shall any carrier, or any person or party in possession of all or any of the said property, or any vessel which receives all or any of the said property, or her master, be liable for any loss or damage sustained by any person or party, or for any loss of, or damage to, all or any of the said property, arising from, caused by, or connected with any one or more of the following-mentioned causes, to wit:—Any act of God, or a public enemy; any act of any government or municipality, or any official act; any rebellion, insurrection, mob, riot, strike or combination; any peril, danger or accident of or incident to navigation or transportation, receipt or delivery, storage or wharfage; any fire, collision, explosion of any kind, bursting or collapse of any boiler, pipe, chest or flue, any latent defect, or any unseaworthiness or unfitness of or in any vessel or other means of transportation not known to the person or party sought to be made liable; breakage or derangement of any machinery, decay, leakage, wastage, shortage of grain, breakage, wet, steam, combustion, heating, rust, dirt, frost or freezing, rubbing or chafing, contact with or nearness to other property, detention, delay, seizure under legal process, loss or decrease of weight or quantity, change of weather, transshipment, loading or unloading, light-erage, improper packing, bailing, or cooperage; any change in

market value; any act or thing herein permitted; nor shall there be any liability on the part of said company, or any carrier, person, or party, vessel, or her master aforesaid, or on the part of any other vessel owned, chartered, or used by said company, or her owner or master, for any loss or damage herein mentioned, unless the same shall affirmatively, and without presumption, be proven to have been caused by the negligence of the person, party, or vessel sought to be made liable; nor, even if caused by any such negligence, for any loss of or damage to any statue, picture, goldware, silverware, plated ware, coin, bullion, jewel, or watch unless special contract for the transportation thereof other than this be made by special written authority from this company; nor shall there be any liability for or on account of any wrong or mistaken carriage or delivery of, or failure to deliver any property marked, consigned, or addressed improperly or indefinitely, or in initials, characters or numbers; nor in case of alteration or erasure in this instrument shall there be any liability aforesaid which would have not existed had such alteration or erasure not been made. Non-compliance with any ordinance or by-law shall not be deemed negligence or evidence of negligence. Whenever any liability for loss of, or damage to,

328 all or any of said property shall arise, that person or party, or vessel then engaged in the actual carriage or having custody of the property shall be deemed the carrier, and be solely liable for such loss or damage, (and the person or party liable or who might sustain loss in consequence of owning or chartering, or being interested in or as to such vessel, shall have any insurance, however effected, on, as to or covering the property lost or damaged and all benefit and advantage to be derived therefrom, and at the option of such person or party, all amounts of such loss or damage shall be computed on the basis of the value of the property at the place above provided for its delivery, or at its cost at the time and place of its above-mentioned receipt). The said company shall not, nor shall any carrier, person or party, vessel or her master aforesaid, be liable in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable, within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs. Any vessel having all or any of said property on board, may tow or be towed, and may save or aid, or attempt to save or aid, life, person or property, and may delay or deviate for, or with a view to any such purpose, or for, or with a view to, any purpose connected with her navigation, or business. General average payable according to lake custom. All weights shall, at the option of any carrier, be determined by said carrier's scales; and all weights furnished to any carrier shall be subject to correction. If any nitro-glycerine, gunpowder, friction matches, fireworks, or other explosive, or if any property, the carriage of which is prohibited by law, shall be received without knowledge as to its nature, and written assent to its carriage, by the receiver or carrier thereof, the same may, without notice of any kind, be destroyed

without liability therefor, or, at the option of the carrier, may be removed and stored, at the whole risk and expense of the owner.

4th. As to the Erie & Western Transportation Company, this contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company; or on the steamship pier at the port of Baltimore. The said The Erie & Western Transportation Company shall not, nor shall any of its connections, inland or ocean, be liable for delay, nor in any other respect than as warehousemen, while the said property remains on the wharf waiting for further conveyance.

It is also stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer of the line above stated leaving, after the arrival of such articles at said port the said The Erie & Western Transportation Company, the steamship company, steamer or owner is at liberty to forward them by succeeding steamers of said line, or if deemed necessary, in the steamers of any other line.

5th. In respect to the service after delivery by the Erie & Western Transportation Company at the port as aforesaid it is mutually agreed as to the steamship company, steamer, owner, and all other parties undertaking any part of said service, as follows: The ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods, and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamship. General average payable according to York-Antwerp rules of 1890.

329 It is also mutually agreed that the steamship company, steamer or owner shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters, by fire from any cause and whosoever occurring; by barratry of the master, or crew, by enemies, pirates, or robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull, machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the ship-owner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods, or of the insufficiency of packages nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage.

I. It is also mutually agreed that the carrier shall not be liable

for gold, silver, bullion, specie, documents, jewelry, pictures, embroidery, broderies, perfumeries, works of art, silks, furs, china, porcelain, watches, or clocks in any respect, or for goods of any description whatever above the value of \$20 per cubic foot, and in no case is the carrier to be liable beyond \$500 per package, unless bills of lading are signed therefor, with the value therein expressed and a special agreement is made.

II. Also, that shipper shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of their contents.

IV. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all expenses thereby incurred on the goods shall be a lien thereon.

V. Also, that the ship may commence — discharge immediately on arrival and discharge continuously, the collector of port being hereby authorized to grant a general order for discharge immediately on arrival, and upon discharge the goods shall be at the risk of the consignee. And if not taken by him within such time as is provided by the regulations of the port of discharge they may be stored by the carrier at the expense and risk of their owners; and the responsibility of the steamship or steamship line for merchandise to be carried at a through rate to a port beyond the port of discharge shall terminate on the delivery of the goods or property to the next carrier.

VI. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also, that if on sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom-house, less all charges saved, except a lower value has been agreed upon with the shippers, and such value noted hereon.

IX. Also, freight payable on weight, is to be paid on gross weight discharged or landed from ocean steamship, unless otherwise agreed.

X. Also, goods destined for a continental port, in the event of the continental steamer being prevented by ice from reaching destined port, the master reserves the liberty of landing cargo at nearest open port he can reach with safety, or bringing it back to port of trans-

shipment, in either case at consignees' risk and expense, but charging outward freight only; or, should the last steamer of the season have sailed for the above-destined port, the goods may be sent to the port nearest to their destination with which there is direct communication, or may be warehoused at the intermediate port at the expense and risk of the owners of the goods.

XI. Parcels for different consignees collected or made up in single packages addressed to one consignee to pay full freight on each parcel.

XII. Also, that the property covered by this bill of lading is subject to all the conditions expressed in the customary form of bills of lading in use by the ocean steamer or Ocean Steamship Company at time of shipment.

In witness whereof, the agent signing on behalf of the said The Erie & Western Transportation Company, and of the said Ocean Steamship Company, or ocean steamer and her owner, severally and not jointly, hath affirmed to two (2) bills of lading, all of this tenor and date, one of which bills being accomplished and given up to the carrier, the others to stand void.

Dated in Winona, Minn., this 3rd day of October, 1891.

H. C. SHEPARD, *Agent*,
Per F. J. LILLY.

Attention of shippers is called to the act of Congress of 1851:

"Any person or persons shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise to the master, mate or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

And afterwards, to wit, on February 16th, 1897, an entry was made upon the journal of said court in said cause, which reads and is as follows:

331 United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK" ET AL.

v.

THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL. }

Appeal from the district court of the United States for the eastern district of Michigan.

Before Judges Taft, Lurton, and Severens.

This cause came on this day to be heard and was argued in part by Mr. H. C. Wisner for the appellants, and the hearing is continued until tomorrow morning.

And afterwards, to wit, on February 17th, 1897, an entry was made upon the journal of said court in said cause; which entry is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK" ET AL.

v.

THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL. }

Appeal from the district court of the United States for the eastern district of Michigan.

Before Judges Taft, Lurton, & Severens.

This cause came on this day to be further heard and was argued by Mr. H. C. Wisner and Mr. C. E. Kremer for the appellants and by Mr. F. H. Canfield for intervenors and by Mr. John C. Shaw and Mr. Harvey D. Goulder for the appellees, and is submitted to the court for a decree.

And afterwards, to wit, on July 6th, 1897, an order was entered in said court in said cause; which order reads and is as follows:

332 United States Circuit Court of Appeals for the Sixth Circuit.

ERIE & WESTERN TRANSPORTATION CO. ET AL.

v.

PROPELLER "NEW YORK," UNION STEAMBOAT CO., Claimant. }

Upon application of counsel for the appellant, it is hereby ordered that the first bond given by the American Surety Co. herein be, and the same is hereby, discharged.

And afterwards, to wit, on October 5th, 1897, a decree was entered in said court in said cause, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

PROPELLER "NEW YORK"

v.

ERIE & WESTERN TRANSPORTATION
Company.

} Appeal from the District
Court of the United States
for the Eastern District of
Michigan.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Michigan and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to the court whence it came with directions to dismiss the libel of the owners of the "Conemaugh" and the peti-

333 tion of the intervening insurance companies, and to enter a decree *in personam* in favor of the owners of the "New York" against the owners of the "Conemaugh" for the agreed damage to the "New York."

And afterwards, to wit, on October 14th, 1897, an opinion was rendered in said cause; which opinion reads and is as follows:

Opinion.

334 United States Circuit Court of Appeals, Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York," vs. THE ERIE & WESTERN TRANSPORTATION Co. <i>et al.</i>	}	No. 461. Appeal from the District Court of the United States for the Eastern District of Michigan.
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Submitted Feb. 17, 1897; decided Oct. 5, 1897.

This is an appeal from a decree of the district court for the eastern district of Michigan in admiralty for about \$70,000, against the steamer the City of New York, owned by the appellant and claimant, The Union Steamship Company, in favor of The Erie and Western Transportation Company, the libellant and owner of the steamer Conemaugh, for damages sustained by the latter from a collision between the two steamers, which resulted in the sinking of the Conemaugh in the Detroit river. The collision occurred in the Detroit river, near the Canadian bank, at a point a little above and nearly opposite a coal station known as Smith's coal dock, where vessels are accustomed to secure their supplies of coal, about two miles below the city of Detroit. On the evening in question, that of October 21, 1891, about 8 o'clock, the weather being clear with no moon, the steamer Burlington, with a tow of four lumber-laden barges, bound down, was rounding to to take coal at Smith's dock. She had taken her tow well over toward the Canadian shore, and her speed, while rounding to, was at a rate of less than four miles an hour, including the two and one-half mile current of the river. Before the Burlington had reached the mid-stream in executing this maneuver, she sighted the steamer City of New York, a propeller two hundred and seventy feet in length, coming up the river on the American side, about a mile below. The Burlington blew a single blast to the New York, which was answered by a single blast, and the New York ported her helm and swung toward the Canadian shore to pass the tow on her port hand. The Burlington proceeded slowly across the river, and as she was rounding to Smith's dock, and five hundred or six hundred feet distant from it, her master discovered the lights of a steamer, which afterward proved to be the Conemaugh, bound down the river. The Conemaugh was then on the American side of, and two hundred and fifty feet away from,

335

the Kasota spiles, a lighted obstruction in the middle of the river, and some thirty-five hundred feet from Smith's dock.

The Burlington blew a blast of two whistles to the Conemaugh, which was answered by the Conemaugh. The Conemaugh thereupon put her helm hard-a-starboard, swung around south of the Kasota spiles and headed directly across the river toward the Canadian shore. As she starboarded the captain checked her speed, so that her engines, instead of making seventy revolutions, made but forty. As she steadied on the starboard helm, her captain descried the tail of the tow about two points off his starboard bow, going down the river on the Canadian side, and directed his wheelsman and his second mate, who was assisting at the wheel, to port and follow the tail of the tow down. About the time of this order, the captain and his lookout discovered the New York coming up the river, and gave two blasts of his whistle. The New York did not answer this signal, and as the Conemaugh ran on, her captain repeated the double blast, which again was not answered. A short time afterward, as he drew near the wake of the last barge of the tow, he gave a third double blast, which was also unanswered. The New York, after having ported on exchanging signals with the Burlington, continued up the river across the mid-stream, heading in such a way that if she had continued on her course she would have run down the Amaranth, the third barge of the tow. When about seven or eight hundred feet from that barge she ported again and on a parallel course with the two last barges, which were sagging downstream so that their bows pointed two points from an up and down course, she passed them both at a distance of from fifty to one hundred feet. The answer of the New York admits that those in charge of her did not hear the first two double blasts of the Conemaugh, and avers that they only heard the third double blast, and that even then, not discovering the Conemaugh, they did not think this signal was intended for the New York. When the New York did not answer the third signal, the Conemaugh, which, until then, had been following the barges of the tow down, put her wheel hard-a-starboard, blew alarm signals and swung over toward the Canadian bank across the bows of the New York. The New York put her helm hard-a-starboard and struck the Conemaugh on her starboard bow about thirty feet from her stem. At the time of the collision the captain of the Conemaugh rung up the engine to work ahead strong, and her engines did so for more than a minute. She sank on the channel bank of the Canadian shore. The collision occurred astern of the last barge in the tow and a little toward the Canadian shore. At the close of the evidence for the libellant the respondent declined to introduce evidence, contending that on the evidence for the libellant the respondent was entitled to a decree dismissing the libel. The district court held that the City of New York was at fault; first, in failing to keep a proper
 336 lookout and answer signals; second, in failing to keep her course; and, thirdly, in not stopping and reversing when there was danger of collision. The court further held that the Conemaugh was also at fault in failing to stop and reverse when the risk

of danger was imminent. The proctors for the Conemaugh filed a motion for rehearing and for a modification of the decree in so far as to free the Conemaugh from fault, and for leave to introduce certain additional evidence. The court heard the motion for rehearing, and without granting leave to introduce evidence, modified the decree so as to relieve the Conemaugh from fault and to assess the entire damages against the New York. Subsequently, the proctors for the New York, on the ground that the interlocutory decree entered had been a surprise to them, applied for leave to introduce evidence. This was denied. A hearing was then had before a commissioner, the damages were assessed and the decree entered and this appeal taken.

There are other parties to this bill, who were interveners in the court below. These interveners were several insurance companies, who had underwritten the cargo, who had received and accepted an abandonment of the same subsequent to the collision, who had paid the owners as for a total loss and who had thereby become subrogated to the rights of the owners of the cargo.

As the decree appealed from distributed a part of the sum awarded as damages to the interveners, they were made parties to this appeal.

Before Taft and Lurton, circuit judges, and Severens, district judge.

TAFT, circuit judge, delivered the opinion of the court.

We must first decide what are the rules of navigation to which the colliding vessels were obliged to conform. The collision occurred in Canadian waters, and it is contended by counsel for the appellee that the Canadian statute of navigation must govern the court in the consideration of the conduct of the parties. It is settled by the decisions of this court in the *North Star*, 22 U. S. App., 242, and the *City of Mackinac*, 43 U. S. App., 190, that in the absence of proof of the Canadian statute the proper navigation at the time of this collision was prescribed by section 4233 of the Revised Statutes of the United States, as supplemented by the rules adopted by the supervising inspectors under the authority of section 4412, R. S. It is conceded that at the hearing in the court below the Canadian statute was not introduced in proof, and that neither the counsel nor the court relied on its provisions. It is also apparent from the evidence that the captains of the colliding vessels both regarded themselves as acting under and subject to the Federal statute and the supervisors' rules at and before the time of the collision. At the hearing of the motion made by libellant for a rehearing and a modification of the decree, so as to hold the Conemaugh free from fault, some reference seems to have been made to the Canadian statute. This we gather, not from the record, but from the affidavits of the counsel for libellant, and 337 the clerk of the district court, filed in support of a motion for a certiorari. From the affidavit of the clerk it is to be inferred that the reference to the Canadian statute was only *arguendo*, and that there was no formal offering of the same in evidence. Indeed, it is difficult to understand how there could have been an

offering of the same as evidence upon the issue made on the pleadings, because the action of the court in modifying the interlocutory decree seems to have taken on the evidence as adduced at the trial and without a new hearing of the cause. The motion of libellant for rehearing asked for leave to introduce new evidence, but the Canadian statute was not mentioned in the description of the evidence to be offered. The respondents asked leave to introduce new evidence after the court had modified the decree, and this was denied. Now, the respondents had stood upon the evidence of libellant at the trial, and had adduced no evidence of their own. If the libellant had been permitted, on a rehearing, to introduce the Canadian statute and to change materially the rules of conduct to which the parties were to be held, then it would seem hardly fair not to have allowed the respondent to call its witnesses to meet a different case from that in which it had not deemed it necessary to call any one. But disregarding these considerations, the conclusive reason why the court cannot consider the Canadian statute as part of this record is the return of the district court to the writ of certiorari. It contains no certificate that the Canadian statute was made part of the record by being offered and received in evidence, but only a statement by the clerk that that which is returned is a correct copy of the Canadian statute *as published*. The district court and the clerk seem to have construed the action of this court, in issuing the writ, as a decision or finding that the Canadian statute was a part of the record below, and an order to certify the same, whereas the writ merely directed the court to complete the record if, in any respect, it was defective, leaving to that court to decide what constituted its record. We cannot regard the Canadian statute, therefore, as in evidence or as part of the record before us.

It might have been a question, even if the Canadian statute had been properly proved, whether two merchant vessels of the United States, proceeding from one port of the United States to another, and incidentally crossing and recrossing the national boundary, were not, though in Canadian waters, still to be held by a court of the United States as bound by section 4233, the opening words of which are as follows:

"The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States."

We do not decide this point because, though suggested by counsel, it is not before us. All that we do hold is, that in the absence of the proper proof of the Canadian statute, the presumption is that section 4233 and the supervising inspectors' rules furnish the law of navigation for the cause.

It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh
 338 had the New York on her own starboard side. Under such circumstances, by rule 19 of section 4233, R. S., the Conemaugh was required to keep out of the way of the New York, and by rule 23, the New York was required to keep her course unless, as provided in rule 24, special circumstances existed, rendering a

departure from rule 22 necessary to avoid immediate danger. Rule 2 of the supervising inspectors, further limited the discretion which the Conemaugh had in selecting the manner in which she could keep out of the way by providing that when steamers were approaching each other in an oblique direction, as these were, they should pass to the right of each other, as if meeting "head and head," or nearly so. The learned district judge was of opinion that rule No. 2 did not apply in this case, because he thought the situation here was within an exception to rule 2, stated in a note to the supervising inspectors' rules, by which all the rules are made inapplicable to steamers navigating in a crowded channel. In this we cannot agree with him. The width of the navigable channel between the tow and the Canadian shore before and at the time of the collision was variously estimated as from five hundred to seven hundred and fifty feet. For reasons which we shall hereafter state, we think it was about five hundred feet. The Conemaugh had not entered that channel, but was above it in the river at least three hundred feet. She had the whole width of the river on her star-board hand, and had full opportunity to port her helm and run down into the bight of the tow out of any danger had she desired to do so, and this with very little delay. Had she done this, there would have been no collision. It follows that she was guilty of a fault, which caused the collision.

We should have reached this conclusion even if the Conemaugh was not bound by rule 2 of the supervising inspectors, and was only under obligation to keep out of the way of the New York, with discretion to pass her on either hand. The evidence satisfies us that the Conemaugh was in the course of the New York when the collision occurred. What was the course of the New York? Her general course was upstream, and probably if she followed the usual track of steamers (though this was not invariable), a little toward the American side of mid-channel. It is well settled, however, that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence and must allow for the effect.

The Iron Chief, 22 U. S. App., 473.

John L. Hasbrouck, 93 U. S., 405.

The D. S. Stetson, 4 Ben., 508.

S. C., 7 Fed. Cases, 1132.

The John Taylor, 6 Ben., 227.

13 Fed. Cases, 896.

The Velocity L. R., 3 P. C., 44.

Marsden on Collision (2d ed.), 473.

The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken
 339 had the Conemaugh not been in sight. As the New York came up the river the Burlington's tow was stretched across the river, and by an exchange of signal blasts a proper agreement had been reached by which the New York was obliged to go round

the tail of the tow, having it on her port hand. This required the New York, coming up on the American side of the channel, to port her wheel and change her course toward the Canadian shore. As she was about a mile distant when the signals were exchanged, it is highly probable that she could not, in a dark night, at once determine the length of the tow, or fix the place of the last barge in it. It was entirely natural and proper navigation for her to change her course only moderately to starboard until she could pick up the tail of the tow and avoid going uselessly near the Canadian shore and more out of her general course up the river than necessary. The evidence shows then that after first porting her wheel, she ran on a course which would have carried her into the Amaranth, the third barge in the tow; that when about eight hundred feet away, she ported again and took a course which was about parallel with the then course of both the Amaranth and the Ferguson, the last two barges of the tow, and one hundred feet distant therefrom toward the Canadian shore. Their course was about two or three points toward the American shore from the course of the river and channel, and so the course of the New York was then two or three points from the mid-channel line toward the Canadian shore. The great weight of the evidence establishes that the New York did not again change her course to starboard after she ported her wheel eight hundred feet away from the tow to pass the last two barges. The libel charges that when near the last barge she ported her wheel and swung violently to starboard, and thus brought about the collision. We think the evidence utterly fails to show this, and that she made no change of her course to starboard, which the presence of the tow, sagging downstream and slowly crawling across the river, did not make necessary. But it is said that after the New York passed the tow, her proper course was to swing to port under the stern of the last vessel in the tow, and thence over toward mid-channel, instead of which she continued on toward the Canadian shore and ran into the Conemaugh. It is undoubtedly true that the New York's proper course, after passing the tow, was to resume her general course upstream near mid-channel.

John L. Hasbrouck, 93 U. S., 405.

All the witnesses who observed her course admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port, and the only question is, Did she begin to do this as soon as she ought to have done it? How soon ought she to have done it? She was not obliged to turn a sharp corner round the stern of the last barge on the tow. She certainly would not have done this had the Conemaugh not been there, and as we have seen her proper course could not be affected by the fact of the Conemaugh's presence. Her natural course would have been to

340 swing gradually to port under a slowly-turning starboard wheel so as to make an easy sweep back to midchannel. The Conemaugh could not, by pressing on it, make the course of the New York one requiring her to dodge in between the tail of the tow

and the Conemaugh. In answering the question, whether the actual course of the New York was in accord with her proper course thus stated; we may derive considerable light from the evidence as to the distance of the New York and the Conemaugh from the tow when the collision occurred. The captain of the Conemaugh says the distance was seven hundred and fifty feet. The captain of the Ferguson puts it at about the same distance. The mate of the Conemaugh makes the distance about three hundred feet, and this is the effect of the evidence of the captain of the Amaranth. We are of opinion, from the circumstances in the case, that the smaller distance is much more likely to be correct. An examination of the chart shows that the distance which the Conemaugh was from the tail of the tow, when her engines were checked, did not exceed twelve hundred feet. The statement of her engineer as to the time between that check and the collision was about four minutes. The relative speeds of the Conemaugh and the tow were such that the former was gaining on the latter at least three miles an hour. Allowing for the curved course the Conemaugh took in following the tow down, and allowing half a minute between the hard-a-starboard swing of the Conemaugh and the collision, she must certainly have been within three hundred feet of the tow when the swing occurred. But it is said that this conclusion is at variance with the place where the Conemaugh grounded on the channel bank. The weight of the evidence shows that the distance of the tow from the Canadian shore was about seven hundred and fifty feet. The channel bank was about two hundred and thirty-five feet from shore. This left the channel between the tow and the bank about five hundred and fifteen feet. It is not clear just how much time there was between the starboarding of the Conemaugh's wheel and the collision, but it is quite evident that there was some time in which to make headway toward the Canadian shore, and after the collision the evidence is that the engines of the Conemaugh worked ahead strong for a minute or more. This is quite sufficient to show that the Conemaugh might have starboarded her wheel at a point about as far from the shore as was the tow, and though when she blew her alarm signal she was but three hundred feet from the tow, that after being struck by the New York and working hard toward the Canadian shore, she might have brought up on the bank at a point much farther than 300 feet from the position of the tow, which had been constantly moving away from the point of collision. With the distance between the Conemaugh and the tow but three hundred feet, where was the course of the New York with respect to them? It is clear to us that the course of the New York would not naturally be confined to swinging on her starboard wheel through the passage not much wider than her length. That would not have been the easy sweep which she was entitled to make in turning back toward

341 midchannel. The Conemaugh, therefore, being where she was, was either in or dangerously near the course of the New York, and was not keeping out of her way. More than this, she increased her fault by throwing herself right across the bows of the New York. The point where the New York struck her, to wit, only

thirty feet from her stem, shows that if, when she blew her alarm whistle, she had ported her helm, instead of starboarding, she would have entirely avoided the New York by passing that vessel port to port. It is very difficult to explain the navigation of the Conemaugh, or reconcile some of the statements of the captain of the Conemaugh with the admitted situation of the vessels. He says that when he steadied after swinging round the Kasota spiles and heading across the river, he saw the red light of the New York coming up the river and whistled two blasts to her; that as he swung slowly around on his port wheel, following the tail of the tow, he saw both side lights of the New York, and that he continued to do so when he whistled his second signal of two blasts and his third signal of two blasts. An examination of the chart and the necessary courses of the two vessels make it impossible that he could have seen the green light of the New York from the second to the third blast. The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction. And each must have been showing to the other but one light. We did not hear in the argument of counsel, nor can we find in the briefs, any explanation of how both lights of the New York were so long visible to the Conemaugh as her captain testifies. The other witnesses from the Conemaugh differ with the captain as to the lights shown by the New York. Hogan, the mate, saw only her red light at the time of the third signal, and Crowe saw her red light immediately after the second signal. The only importance of this discrepancy in the testimony of the Conemaugh's captain is, that it shows that the porting of the New York's wheel twice in her course from the American side to the tail of the tow must have been evident to him before there was any danger of collision. Another circumstance of much significance in this case is the course of the Conemaugh with respect to that of the two last barges of the tow. Both barge captains say that for some time before the third signal blast they saw both side lights of the Conemaugh. Now, this is only possible if the Conemaugh, instead of crossing their wake, was following along in it for an appreciable time while she was blowing the last one, and, probably, the last two of the signals to the New York. It thus appears that while she was blowing signals indicating a purpose to pass the New York to starboard she was continuing on a course to the port of the New York. It is not explained why, if the captain of the Conemaugh regarded himself as having the right to select his course, and intended, as he says he did, to pass on the Canadian side of the New York, he did not direct his vessel toward the Canadian shore at once, instead of following the tow down on the

342 American side of the course which the New York must follow to clear the barges, and then suddenly swinging across the bows of the New York when that vessel was so near that collision was inevitable. On the whole case we are clear in the conclusion that there were several glaring faults in the management of the Conemaugh which caused the collision.

The question remains, was the New York also guilty of faults in

navigation contributing to this collision? Her owner in its answer admitted that those in charge of her neither saw nor heard the Conemaugh until the third double-blast signal, and that then they only heard the signal without seeing the vessel giving it, and so supposed that the signal was not intended for them. The witnesses for the Conemaugh unite in saying that the New York was going at a speed of ten miles an hour, and apparently not under check. The district court found, from her failure to see and hear the Conemaugh, that the New York's lookout was defective, and that she thus committed the fault of not answering the Conemaugh's signals. He further held that she should have checked or stopped when there was risk of collision, and that her failure to do so was a fault contributing to the disaster.

It must be conceded that if the New York had heard the signals of the Conemaugh she would not have been obliged to respond by a double blast and signify her willingness to pass starboard to starboard, instead of port to port. Under rule 2 of the supervising inspectors, the Conemaugh was obliged to keep on the New York's port hand, and nothing but her consent, expressed in a double blast to depart from the rule, would justify the Conemaugh in assuming that consent. This was not a case where silence gave consent. Rule 2 requires signals to be given and promptly returned. It has been suggested that this requirement of a prompt answer applies only to the case where the first signal is to indicate a compliance with the rule, and not as in the case at bar, where the signal invited a departure from it. This suggestion finds some support, it is said, in the language of Mr. Justice Brown in *The Delaware*, 161 U. S., where, speaking for the Supreme Court, he limits the use of signal blasts by the preferred vessel of two crossing vessels to an announcement that she is maintaining her course according to rule. The learned justice said: "These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on, and the signals therein provided for are designed to apprise the approaching vessel of the intention of the steamer giving the signal to port or starboard, as the case may be. As applied to vessels crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her."

We do not find it necessary to decide whether the New York should have returned a signal of one blast or not, because it is clear to us that her failure to do so did not contribute to the collision. So far as the Conemaugh was concerned, the New York's silence was exactly equivalent to her express refusal to consent to depart from the rule by a single blast. There are several cases in which the exact point has — decided. *The John King*, 49 Fed. Rep., 469; 1st U. S. App., 64, was a case of crossing vessels, in which the preferred vessel was condemned by the district court for not promptly returning an answer to a signal inviting her to depart from rule 2. The circuit court of appeals of the second circuit re-

versed this decree, and Judge Wallace, in delivering the opinion of the court, said, referring to the other vessel: "It was her duty, under sailing rule 19, to keep out of the way, and the duty of the ferry-boat to keep her course. The red light of the ferry-boat was plainly visible to the propeller, and there was nothing in the way to prevent the latter from passing astern of the ferry-boat. She had concluded previously to pass across the bow of the ferry-boat, but had received no consent from the ferry-boat to such a course, and there was still time to abandon that purpose and go astern. The latter course was plainly safe, the former doubtful, and quite irrespective of any rule of the supervising inspectors; common prudence required her to adopt the safe course and pass astern. She cannot invoke the aid of any rule of the supervising inspectors to justify her departure from duty without showing that her proposition to depart was heard, understood and accepted by the ferry-boat. If, by her signals, she invited a departure from the ordinary rules of navigation, she took the risk, both of her own whistles being heard and in turn of hearing the response, if response was made." Again, Judge Wallace says, speaking of the ferry-boat:

"The signal she gave to the propeller when she got out into the river was the proper signal, viz., one blast to indicate that she proposed to keep to the right. If she had heard the second signal of the propeller she could have done no more by way of a proper answer, and would have been under no obligation to give a different signal. This signal was given at a time when there was yet opportunity for the propeller to alter her course to starboard and pass astern. If we should assume that she heard the propeller's signal, or ought to have heard it, and should have answered it by two blasts of her whistle, we do not see how the propeller was misled by the conduct of the ferry-boat. We do not think, however, that if the ferry-boat had heard the propeller's signals her failure to answer them would have been culpable. The case, in its legal aspects, is quite similar to that of the *B. B. Saunders*, 23 Blatchford, 383; 25 Fed. Rep., 727, in which the court used this language: 'Notwithstanding the inspector's regulations, therefore, the pilot of the *Saunders* was not bound to assent to the movement proposed by the *Orient*, unless due regard to the particular circumstances of the situation required a departure from the ordinary rule. Consequently, his failure to answer the signal of two blasts of the whistle from the *Orient* was not culpable, unless it was apparent that the *Orient* could not safely pass astern of the *Saunders*.'"

See also *The Florence*, 61 Fed. Rep., 949.

The St. John, 7 Blatchford, 200.

The Milwaukee, 1 Brown's Admiralty, 313.

344 It is manifest to us that the failure of the *New York* to respond by a one-blast signal to the two blasts of the *Conemaugh* had no causal relation to the collision, because the silence of the *New York* was full notice to the *Conemaugh* that she must obey rule 2.

Again, how did the *New York's* failure to see the *Conemaugh* con-

tribute to the collision? Suppose the New York's lookout had seen every maneuver of the Conemaugh, would her course have been different from what it was? We do not think so. She had the right and duty to maintain her course, and that we have found that she did. She would have had no right to infer that the Conemaugh would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the Conemaugh, not having established an agreement to pass starboard to starboard, would maintain her bearing to the port of the New York and swing clear on that side. Especially is this the case when, if she had seen the Conemaugh, she would have observed her swinging slowly to the port of the New York in the wake of the barges in the tow, although blowing signals of her intention, if assented to, to change her course to the starboard of the New York.

But it is said she ought to have stopped and reversed when there was risk of collision. The only risk of collision would have been in the Conemaugh's failure to keep to port, and this failure she was not bound to anticipate. The law on this subject has been settled by the Supreme Court in *The Britannia*, 153 U. S., 130, and *The Delaware*, 161 U. S., 459. In the latter case Mr. Justice Brown, speaking for the Supreme Court, used this language:

"The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion, both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th rule of the original international code (Rev. Stat., sec. 4233), and of the 16th rule of the revised code of 1885, and doubtless applies, so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English and, perhaps, of American authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be *in extremis*, he is bound to hold to his course and speed.

345 "The case of *The Britannia*, 153 U. S., 130, and *The Northfield*, 154 U. S., 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon

the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts, on the part of the master of the obligated steamer, as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. (*Belden v. Chase*, 150 U. S., 674; the *Highgate*, 62 L. T. R., 841; S. C., Asp. Mar. Law Cases, 512.)"

This clearly shows that the New York had the right and duty to maintain her speed, as well as her course, unless there was to her some distinct indication that the Conemaugh was not going to keep out of her way by porting. She received no such distinct indication until the Conemaugh suddenly starboarded her helm and swung across the fast approaching bows of the New York, and then it was too late to avoid the catastrophe.

We find, then, that it was the fault of the Conemaugh which alone caused this collision; that the libel of her owner should therefore be dismissed, and that on the cross-libel of the owner of the New York a decree *in personam* against the owner of the Conemaugh for the agreed damage to the New York should be entered. This conclusion disposes also of the petition of the intervening insurance companies, which must also be dismissed.

The decree of the district court is therefore reversed, with directions to enter a decree in accordance with these conclusions.

346 And afterwards, on November 10th, 1897, an order extending time to file petition for rehearing was entered upon the journal of said court in said cause, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

STEAMER "NEW YORK" ET AL.

v.

ERIE & WESTERN TRANSPORTATION COMPANY. }

Time to file a petition for rehearing herein is hereby extended to November 23rd, 1897.

And afterwards, to wit, on November 23rd, 1897, a petition for rehearing was filed in said court, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller
"New York,"

vs.

THE PROPELLER "CONEMAUGH," THE ERIE & WESTERN TRANSPORTATION Company, Claimant, and The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, Intervenor, Appellees.

347

The Petition of Intervenor for Rehearing.

Now come the above-named intervenors, by F. H. and Geo. L. Canfield, their proctors, and respectfully ask that an order may be made granting them a rehearing in this cause, and they show to the court:

1. That they were the underwriters on the cargo of the said propeller "Conemaugh" at the time of the collision mentioned in this cause, and as such suffered a loss by reason of said collision to the amount of more than twenty thousand dollars, and, although they and the cargo in which they were interested were innocent of any fault resulting in said collision, by the decree of this court, made and entered in said cause, they are denied a remedy for such loss.

2. As they are advised, the court erred in holding that the propeller "Conemaugh," just before the collision occurred, was swinging under a port wheel and following the tail of the tow, and that the collision resulted from a subsequent starboarding on the part of the "Conemaugh," which brought her across the course of the "New York," and that the "New York" was therefore under no obligation to check her speed or stop, notwithstanding that the "Conemaugh" had repeatedly signalled her intention to pass to starboard of the "New York."

3. That, as they are advised and believe, this court erred in holding that although the "New York" and the "Conemaugh" were on crossing courses so as to involve risk of collision, the "Conemaugh" having the "New York" on her starboard side, and although it was the duty of the "New York," under rule 23, to keep her course, yet the "New York" was justified in changing her course because of the presence of the barges "Amaranth" and "Ferguson," constituting a part of the tow of the propeller "Burlington."

4. As they are advised, the court erred in not holding that the "New York" was in fault:

348 a. For want of a proper lookout.

b. For improperly changing her course.

c. For not checking or stopping when risk of collision with the "Conemaugh" became evident.

d. For not signalling the "Conemaugh" as required by the rules of the supervising inspectors.

Wherefore your petitioners pray that a rehearing of this cause may be granted, and that said decree may be so modified as to de-

clare that the "New York" was in fault for said collision, and that these intervenors may recover against her owners and their sureties the damages resulting to them by reason of said collision.

THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED,
THE INSURANCE COMPANY OF NORTH AMERICA,
THE UNION MARINE INSURANCE COMPANY, LIMITED,
THE MARINE INSURANCE COMPANY,

By F. H. & G. L. CANFIELD, *Their Proctors.*

F. H. CANFIELD, *Of Counsel.*

The Erie & Western Transportation Company, as trustee for the underwriters upon the cargo of the "Conemaugh" who have not intervened, and also in its own behalf as owner of said propeller, herewith unites with the above-named intervenors in their application for a rehearing in this cause, and asks that, for reasons therein stated, the decree of this court may be so modified as to declare the propeller "New York" solely in fault, and prays that such other and further order for decree may be made herein as justice may require.

THE ERIE & WESTERN TRANSPORTATION COMPANY,
By HARVEY D. GOULDER AND
JOHN C. SHAW, *Its Proctors.*

I hereby certify that, in my opinion, the foregoing petition is well founded in law.

F. H. CANFIELD, *Of Counsel.*

349 And afterwards, to wit, on February 8th, 1893, an order on petition for rehearing in said cause was entered upon the journal of said court, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE PROPELLER "NEW YORK," THE UNION STEAMBOAT COMPANY, }
Claimant, }

v.

THE ERIE & WESTERN TRANSPORTATION CO. }

The court, upon due consideration of the petition for rehearing filed herein by the intervening petitioners, hereby dismiss the same.

350 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of The Union

Steamboat Co., claimant of the propeller New York, *vs.* The Erie & Western Transportation Co. *et al.*, No. 461, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this fifth day of April, 1898.

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

351 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Union Steamboat Company, claimant of the propeller "New York," is appellant and The Erie & Western Transportation Company *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Michigan, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court

352 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Received this writ this 9th day of May, 1898, and return the same in accordance with the stipulation filed in this court the same day, which is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller
"New York," Appellant,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Owner of
the Propeller "Conemaugh;" The British & Foreign Marine
Insurance Company, Limited; The Union Marine Insurance
Company, Limited; The Insurance Company of North Amer-
ica, and The Marine Insurance Company, Intervenor, Ap-
pellees.

It is hereby stipulated that the certified copy of the transcript of
record filed in the Supreme Court with the application for the writ
of certiorari in this cause shall stand as the return to said writ,
except such part thereof in the printed record as appears under the
heading "supplemental record," commencing at page 253 and end-
ing at page 270, which part was not used as any portion of the case
at the hearing in this court.

Dated May 5th, 1898.

C. E. KREMER,

Proctor for Appellant.

F. H. & G. L. CANFIELD,

Proctors for Intervenor.

HARVEY D. GOULDER,

Proctor for Appellee The Erie &

Western Transportation Company.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,

Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

353 [Endorsed:] No. 16847. Supreme Court of the United
States. No. 277, October term, 1898. The Erie & Western
Transportation Co. *et al.* vs. The Union Steamboat Company. Writ
of certiorari and return. Filed May 16, 1898.

Endorsed on cover: Case No. 16,847. U. S. C. C. of appeals, 6th
circuit. Term No., 277. The Erie & Western Transportation Com-
pany *et al.*, petitioners, vs. The Union Steamboat Company, claimant
of the propeller "New York." Filed April 12, 1898.



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JAMES H. MCKENNEY,
CLERK.

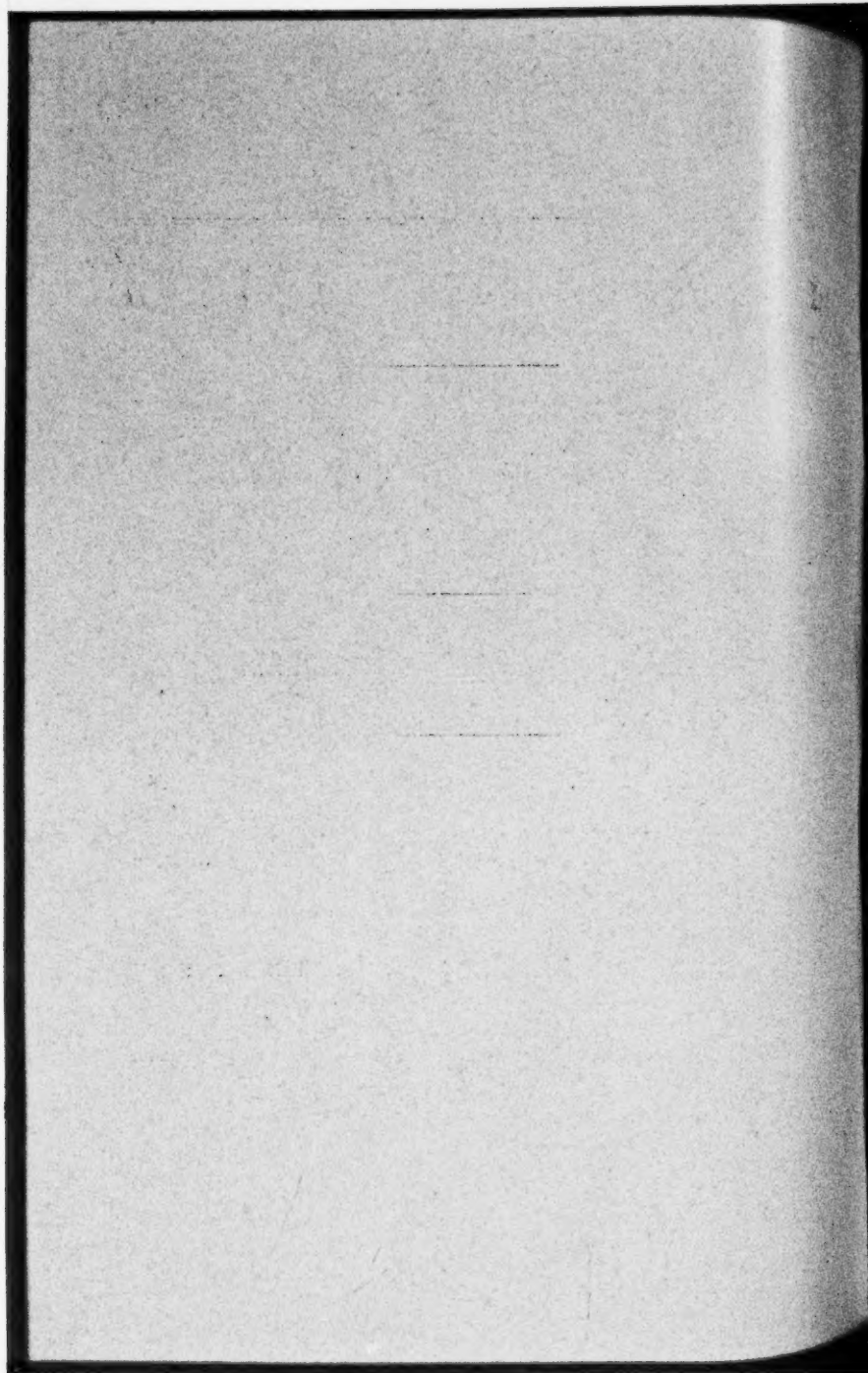
In the Supreme Court of the United States.

**PETITION OF THE ERIE & WESTERN TRANSPORTATION
Co., THE BRITISH & FOREIGN MARINE INSURANCE
Co., LIMITED, THE INSURANCE COMPANY OF NORTH
AMERICA, THE UNION MARINE INSURANCE COMPANY,
LIMITED, AND THE MARINE INSURANCE Co.**

PETITION FOR WRIT OF CERTIORARI.

**HARVEY D. GOULDER,
JOHN C. SHAW,**
Proctors for Petitioner, The Erie & Western
Transportation Co.

F. H. CANFIELD,
Proctor for Petitioners, The British & Foreign
Marine Insurance Co., et. al.



In the Supreme Court of the United States.

The petition of The Erie & Western Transportation Company, The British & Foreign Marine Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, for writ of certiorari, directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of The Union Steamboat Company, Claimant and Appellant, against the propeller Conemaugh, The Erie & Western Transportation Company, et al., Claimants and Interveners.

To the Honorable Judges of the Supreme Court of the United States.

The said petitioners respectfully show to this court as follows:

I. Your petitioner, the Erie & Western Transportation Company, is a corporation of the Commonwealth of Pennsylvania, and the other petitioners are insurance companies and corporations duly created and existing under the laws of various states and countries, and that the said transportation company is the owner of the propeller Conemaugh and was at the time of the collision mentioned in this cause, and that the other petitioners were underwriters on her cargo and as such suffered a loss by reason of said collision, the aggregate of the loss, as fixed by the decree of the District Court herein, being \$69,978.91.

II. The case grows out of a collision which occurred on a clear, pleasant, starlight evening, close to the Canadian bank of the Detroit river, a short distance below the city of Detroit, between the said propeller Conemaugh, bound down and laden with miscellaneous cargo, and the Union Steamboat Company's steamer, the New York, bound up the river, in which the Conemaugh was struck on her starboard side forward and almost immediately thereafter beached and filled on the Canadian channel bank.

III. The Conemaugh, with all the signal lights required by law, properly placed and burning brightly, having a full complement of officers properly stationed and attentive to their duties, with two men at the wheel, was proceeding down on a course somewhat to the American side of midchannel. Reaching a point about three-quarters of a mile above a dock on the American side, known as Smith's coal dock, her watch discovered the propeller Burlington, with a tow of four lumber barges, whose course down the river had been on the Canadian side of midchannel, but was now rounding to for the purpose of coming up to Smith's dock. The full length of the tow was about 2826 feet; the channel at that point was about five-eighths of a mile in width. When

the Burlington had come around so as to exhibit to the Conemaugh her green and white lights, and the first barge her green light, the Burlington blew a signal of two blasts, thereby indicating to the Conemaugh that she should pass down between the tow and the Canadian shore. The Conemaugh answered with two blasts, checked the speed of her engine from 70 to 40 revolutions, and hard starboarded in accordance with the signals exchanged. The master of the Conemaugh seeing, with the aid of his glass, that there was sufficient room for him to pass between the tow and the Canadian shore, assumed a course diagonally across the river, and while on that course the watch on the Conemaugh discovered the lights of what proved to be the propeller New York coming up the river a considerable distance below the tow, and sounded to her a signal of two blasts, indicating her purpose to continue her course and pass down on the Canadian side. The Conemaugh was then in Canadian waters, and the New York, apparently, about midchannel. Receiving no answer, the Conemaugh repeated her signal, but without receiving any reply. The vessels were then perhaps three-quarters of a mile apart. The clear space of navigable water between the tow and the Canadian channel bank, as found by the Circuit Court of Appeals, was not less than five hundred feet, according to the lowest estimates given by the witnesses, a space sufficient for the navigation of the steamers.

The Burlington was then well over to the dock on the American side, the tow forming nearly a semi-circle, the last barge heading some two points to starboard from directly down the river and working down at a speed of about four miles an hour, including the drift of about a two mile current. The Conemaugh was going at checked speed over toward the Canadian shore, heading some 45° from directly across; the New York was on a course below the tow, which, as was later developed by testimony from the barges, would have brought her in collision with the third barge of the tow.

In this situation the Conemaugh again blew a signal of two blasts. Dispute exists as to her distance astern of the tow, the shortest distance suggested by the testimony being three hundred feet; clear evidence, in our opinion, fixing it at from seven hundred to a thousand feet.

As indicated by the lights of the New York, the Conemaugh was crossing the course of the New York at a safe distance ahead, both vessels navigating in Canadian water.

To this third signal of two blasts there was no answer. Shortly afterward the New York, doubtless for the purpose of avoiding the rear barges of the tow, but without signal of any character to the Conemaugh, altered her course by porting; thereupon the Conemaugh blew an alarm signal, put her wheel hard astarboard and gave a strong signal to the engine. The New York, then abreast of a point between the last two barges of the tow, and, in any view of the testimony, not over a quarter of a mile from the Conemaugh, stood on with undiminished speed and having started to swing back on starboard helm, struck the Conemaugh near the forward gangway and she sank within a length (250 feet) of the Canadian bank. The evening being clear and starlight, there was nothing to prevent the New York from seeing the Conemaugh's lights or hearing her signals if a proper watch were kept.

The New York, although her officers and crew were in court,

called no witnesses, but her answer admitted an entire failure to see the lights of the Conemaugh or to regard her signals, the language of her answer being,

"when the New York had arrived at a point abreast of the
"last barge in tow, a signal of two whistles was heard, but being
"unable to see any vessels, and noticing only a white light close
"on the Canadian bank of the river, the signal of two blasts
"was not answered, as it seemed to be intended for some other
"vessel";

also that while passing under the stern of the last barge, having starboarded her helm, she heard several short blasts of the Conemaugh close at hand, not more than 100 feet away, but

"collision was then inevitable, but there was neither time nor
"room enough to stop the engine of the New York, and the only
"way left open to avoid a collision was to continue under
"headway and swing clear under a hard-a-starboard helm."

Before the Burlington had rounded to and sounded the signal of two blasts to the Conemaugh, she had exchanged a signal of one blast with the New York, then a mile and a half or more below the Burlington and coming up somewhat on the American side of midchannel. The New York and Conemaugh were more than three miles apart and these signals were not heard on the Conemaugh nor was the presence of the New York discovered by the Conemaugh, although a proper watch was kept, until after the Conemaugh had starboarded and was in the performance of her agreement with the Burlington, as before stated.

The Circuit Court of Appeals found,

"The New York was proceeding from the American side in
"a slanting direction across the river, while the Conemaugh
"was proceeding down the river in a slanting direction, and
"each must have been showing to the other but one (colored)
"light."

Also,

"It is not disputed that the courses of the two vessels were
"crossing, so as to involve risk of collision, and that the Con-
"maugh had the New York on her own starboard side."

And,

"The Conemaugh, therefore, being where she was, was either
"in, or dangerously near, the course of the New York, and was
"not keeping out of her way."

Although the Conemaugh had indicated to the New York by her signal, repeated three times, her intention to cross the bows of the New York, and although, as admitted in the answer, the Conemaugh "continued on her course across the bows of the New York so that the latter struck her stem on," yet the New York did not at any time signal the Conemaugh, nor did she stop or check her speed before the collision occurred.

IV. On the 11th day of Nov., 1891, the Erie & Western Transportation Company filed its libel in the District Court for the Eastern District of Michigan on behalf of itself as owner of the Conemaugh and as trustee for persons interested in her cargo, and subsequently the insurance companies joining herein intervened for their interest as underwriters on cargo. Answer was duly filed containing the admissions already stated. The case came on for hearing before the District

Court. The witnesses for petitioners, including the officers and crew of the Conemaugh, were examined in open court, and it was held that the collision occurred 900 or 1,000 feet from and a little on the port quarter of the stern barge of the Burlington tow, which barge was held to have been 800 or 900 feet from the Canadian shore, headed somewhat toward the American side of the river. The court held that, assuming a temporary departure by the New York from her course to have been necessary and justified by the presence of the tow, still there was ample room for her to starboard and resume her course after passing the tow, which would have taken her astern of the Conemaugh; that this was a plain duty on her part which the master of the Conemaugh had a right to expect her to perform, as the Conemaugh had then "crossed the lawful path of the New York." Also, that the proofs established that the New York maintained double the speed of four miles, stated in her answer, until the vessels came together and was grossly in fault and negligent in failing to see the lights and hear the signals of the Conemaugh; or, seeing and hearing, guilty of even worse fault in disregarding them. It held that the faults of the New York were so many and flagrant that "it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation." See copy of opinion "A" hereto attached, (53 Fed. 553.)

Having found that the Conemaugh had in fact crossed the lawful course of the New York and was free from fault until the danger signal was blown, the court condemned the Conemaugh for failure to reverse; but afterwards, on petition for rehearing, in view of the fact that collision was then inevitable and so expressly admitted in the answer, and in view of the then recent utterance of this court in the city of New York, 147 U. S. 85, the court modified its decree and exonerated the Conemaugh, as will appear from copy of the opinion of the Court rendered May 16, 1895, a copy of which is hereto attached "B".

V. The case was duly appealed by owner of the New York, to the Circuit Court of Appeals, and that court, modifying only slightly the facts as found by the District Court and addressing its consideration to the three faults against the New York:

- 1st. In failing to keep a proper lookout and answer signals;
- 2d. In failing to keep her course; and
- 3d. In not stopping and reversing when there was danger of collision,

reversed the decree of the District Court, held the New York to be free from fault, dismissed the libel and ordered a personal decree against your petitioner, the Erie & Western Transportation Company, for the damages to the New York, as will appear from the opinion of that court filed October 5, 1897, hereto attached: "C"; (82 Fed. 819). Afterwards petition for rehearing was denied.

VI. Your petitioners respectfully represent to the court that the decree of the District Court in the case should have been affirmed, and that there are several questions involved in this litigation of a general character upon which there have been conflicting decisions of the lower courts, the settlement of which by this court is highly desirable.

1. The Circuit Court of Appeals holds that the great lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the operation of the International

Regulations for prevention of collision at sea, adopted by the United States in 1885, (23 St. 438), and which had been adopted substantially in the same form by the leading nations, and which, as hereinafter shown, governed in Canadian waters.

2. The court also held that it could not regard the Canadian Regulations without technical proof of the law.

The Canadian regulations applicable are Articles 15, 16, 18, 19, 22 and 23 of "An Act respecting the Navigation of Canadian Waters, R. S. C. c. 79," founded on the Imperial Regulations, which came into force September 1, 1884, (Order in Council, 9 P. D. 248), which are identical with the corresponding articles of the International Rules as adopted by us in 1885 (23 St. 438) as follows:

Art. 15.—

"If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other:

- (a) "This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other;
- (b) "The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other;
- (c) "It does not apply by day, to cases in which a ship sees another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Art. 16.—

"If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 18.—

"Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

Art. 19.—

"In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say:
 "One short blast to mean 'I am directing my course to starboard';
 "Two short blasts to mean, 'I am directing my course to port';
 "Three short blasts to mean 'I am going full speed astern.'

"The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made."

Art. 22.—

"When by the above rules one of two ships is to keep out of the way, the other shall keep her course."

Art. 23.—

"In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Under such rules, making the use of signals optional with each steamer, the finding of the Circuit Court of Appeals that the silence of the New York in the face of our signals denoted dissent to our proposal, would have been clearly wrong.

3. Though these vessels were in Canadian waters, the court applied the rules found in Sec. 4233 of the Revised Statutes, and Rule 2 of the Supervising Inspectors' rules which latter require a steamer, having another on her starboard hand, to keep out of the way by porting.

Rules 1, 2 and 3 of pilot rules for lakes and seaboard, are as follows:

Rule I—

"When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right, or port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right, or port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head,' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left, or on the starboard side of each other."

Rule II—

"When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Rule III—

"If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

1107

The Supervisors' rules, extended to foreign waters, were applied to the Conemaugh, but notwithstanding the plain provisions of Rule 111, the absence of lookout and ignorance of the other steamer's presence in dangerous situation, giving signals of an intention to cross the New York's bow, were excused on the ground that seeing lights and hearing signals indicating such course, the New York would still have had the right to maintain her speed in silence.

As to these questions the contention was and is that the great lakes are not to be excluded as "lakes and inland waters" from the operation of the Navigation Act of 1885; that the Supervisors' rules have no extra-territorial force, and if they had, that rule 2, given a construction which when a steamer has another on her own starboard hand, requires the burdened steamer in any such situation, even when practically crossing the course of another at a safe distance ahead, in every case to port, is unreasonable, is in derogation of the statute which, fixing the starboard hand rule, makes no requirement as to how the burdened steamer shall keep out of the way, and so without force; and that a court of admiralty will take judicial notice of the navigation rules of another sovereignty for preventing collision at sea when they are of the character of the Canadian rules.

4. The Circuit Court of Appeals also held that although these steamers were on crossing courses so as to involve risk of collision, and although the Conemaugh had signaled her intention to continue on her course across the bows of the New York, and although under the rules applicable under the revised statutes, it was the duty of the New York to keep her course, still the New York was justified in changing her course to starboard, and in the direction of the course of the Conemaugh, because of the presence of the stern barges of the Burlington's tow, which, as petitioners show, were a temporary moving obstacle in the way of the New York, and which were then moving toward the American shore out of the way of the New York, and which the New York might have avoided by checking or stopping and breasting the current until said barges had gotten out of her way. Upon this point the Court of Appeals in its opinion said:

"It is well settled * * that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence, and must allow for the effect. * * The proper course of the New York was that which the Conemaugh ought to have known, she would naturally have taken had the Conemaugh not been in sight."

5. The Circuit Court of Appeals also held that the New York having changed her course on account of said barges, was not obliged immediately to resume her course after passing the last barge. Upon this point the court, in its opinion, said:

"But it is said that after the New York passed the tow her proper course was to swing to port under the stern of the last vessel in the tow, and thence over towards midchannel, instead of which she continued on towards the Canadian shore, and ran into the Conemaugh. It is undoubtedly true that the New York's proper course, after passing the tow, was to resume her general course up stream near midchannel. All the witnesses who observed her course, admit that just before the collision she

"was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port; and the only question is, did she begin to do this as soon as she ought to have done it? * * * She was not obliged to turn a sharp corner around the stern of the last barge in the tow. She certainly would not have done this had the Conemaugh not been there, and as we have seen, her proper course could not be affected by the fact of the Conemaugh's presence."

The contention of petitioners is that the New York having received signals of two blasts from the Conemaugh, which had her on the starboard hand, was under obligation *as to the Conemaugh* to hold her course, and had no right, especially without giving notice by signaling, to make a change of course which must necessarily tend to hamper the maneuvers of the Conemaugh; that said moving barges did not constitute such an obstruction as justified the New York in changing her course, and if the New York did have the right to change her course in the manner and for the reasons indicated, *she was bound in duty to the Conemaugh to make the least change necessary and to come back to her original course as quickly as practicable after clearing the end of the tow.*

It is found by both courts that there was ample channel room (not less than 500 feet) and the conflict of opinion arises on the finding by the Court of Appeals that the New York did not owe this duty to the Conemaugh, but in making the departure in the direction which tended to interfere with the Conemaugh's announced maneuver for clearing, had the right to pursue such a course in the premises as she would had the Conemaugh not been present.

The Circuit Court of Appeals also held that the New York was entirely without fault, though she failed to maintain lookout or watch or to observe the signals and lights of the Conemaugh or to make any effort whatever to avoid or minimize the effect of collision, since she had the right to navigate as she did.

Contention on this point is that the New York was in fault in this respect in as much as the signals and lights of the Conemaugh, if observed, should have led the New York to check her speed and so obviate the necessity of turning out for the tow; or, if she chose to go on, to make that departure only so great as was necessary to clear the obstruction and then pass to starboard of the Conemaugh; or, in any case, she would have had time to reverse; whereas, the plain admission of her answer is that continuing her speed she did not know and recognize the presence of the Conemaugh in her vicinity, or as affecting in any manner her navigation, until, in the language of the answer:

"A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York."

Indeed, a previous statement of the answer puts the Conemaugh then "close at hand and not more than 100 feet away."

VII. Your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of *certiorari* for the following reasons:

- i. (a) The questions involved arise under collision rules which relate to the navigation of the great lakes, and involve the question whether the American or Canadian law controls in the navigation of American ships in Canadian waters, into

and through which nearly all of the immense commerce of the great lakes must pass in some portion of the voyage.

- (b). Also the question of the extra-territorial force of the rules of the Supervising Inspectors, vessels being required to navigate, as stated, in foreign waters.
- (c). The statute requiring a steamer having another on her own starboard hand to keep out of the way, whether it is competent for the Supervising Inspectors to pass a supplementary rule requiring this to be done in a particular manner.
- (d). After the starboard hand rule has come into operation between two steamers, whether the intervention of another moving steamer is such a special circumstance as will permit the privileged steamer to alter her course, at night, without notice, in such manner as to conflict with the manoeuvre of the burdened steamer to clear, although it is clear that such privileged steamer may at the same time avoid the intervening vessel and hold her own course as to the burdened steamer by simply checking her speed?
- (e). Granting such right, should she make the least deviation necessary and come back as quickly as practicable, or may she make such deviation as if the vessel bound to keep out of her way were not present?
- (f). After the starboard hand rule has come into operation, with its burden and privilege respectively, is the privileged steamer so far privileged as to her course and speed that it is unnecessary for her, at night, to regard the lights and signals of the approaching steamer; and is she so far privileged that upon the intervention of a temporary, floating obstacle, which she may avoid by checking and still hold her course as to the burdened vessel, that, though she chose to maintain her speed and alter her course in a manner and direction which must necessarily embarrass and may thwart the manoeuvre to the burdened steamer to clear, it is unnecessary for her to pay any heed to or give any notice to the burdened vessel of her intention?
- (g). Is the privileged vessel so far privileged that when the burdened vessel is "either in, or dangerously near" the course of the privileged vessel, and is "not keeping out of her way," the privileged vessel need neither stop nor reverse, but having altered her course for a temporary obstacle, may turn back to midchannel on an "easy sweep" regardless of the presence of the burdened vessel?

3. The amount involved is large, being with the New Yew York's damage about \$73,000.00.

3. The decision of the Circuit Court of Appeals as it stands is opposed to decisions of the admiralty courts of this country.

4. The decision of the Circuit Court of Appeals as it stands, exonerates the New York for making a departure from her course at night without notice, after being signaled by the *Conemaugh* and after the starboard hand rules had become operative, so long as that departure, being on account of a temporary floating obstacle, was not greater than she might have made *had the Conemaugh not been there signaling her and though she might in fact have made less departure and so avoided collision.*

5. The decision of the Circuit Court of Appeals exonerates the New York, although she had no lookout or any competent watch, and was ignorant of the presence of a large steamer which had been displaying proper lights and blowing repeated signals until that steamer, with which she collides, was within a hundred feet and collision was inevitable, though the collision occurs while she is engaged in a conflicting change of course made without notice to avoid another moving vessel, after coming under the operation of a rule requiring her to hold her course, and without which change or with a smaller departure, which was possible, the collision would not have occurred.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Sixth Circuit to bring up this case to this Honorable Court for such proceedings as shall seem just.

The Erie & Western Transportation Co.

By Harvey D. Guilden, Proctor.

The British & Foreign Marine Insurance Co., Limited

The Insurance Company of North America

The Union Marine Insurance Company, Limited, &c.

The Marine Insurance Company

By F. H. & G. L. Canfield,

Proctors for

The British & Foreign Marine Ins. Co. et al

Petitioners

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF NEW YORK, }
COUNTY OF ERIE, SS.

E. T Evans, being duly sworn on his oath says that he is the agent of the petitioner herein the Erie & Western Transportation Co.; that said petitioner is a corporation, that deponent has read the foregoing petition and that the same is true to the deponent's knowledge, information and belief, and deponent's knowledge is derived from the fact that he has acted for said petitioner in all matters connected with this litigation.

E. T. Evans.

Subscribed in my presence and sworn to before me this 29th day of
March, A. D., 1898.

Harvey L. Brown
Notary Public
Erie County, N.Y.

We hereby certify that we have examined the foregoing petition
and in our opinion the petition is well founded and the case is one in
which the prayer of the petition should be granted.

Harvey L. Guilder,
Proctor for E. & W. T. Co.

F. H. Canfield, Counsel.

EXHIBIT "A."

Opinions of the District Court.

(53 Fed. 553.)

SWAN, District Judge. The original libel in this cause was filed by the owner of the Conemaugh to recover damages for the sinking of that steamer by the propeller New York, October 21, 1891, in the Detroit river, a short distance below Sandwich, Ont. The New York also received injury, for which her owner filed a cross libel against the Conemaugh. The cases were heard as one. No proofs were offered on the part of the New York.

The circumstances attending the collision were as follows: The Conemaugh, a screw steamer of 1,609 tons burden, (registered,) and laden with 1,800 tons of flour and general merchandise, was on her way from Milwaukee to Erie, Pa. She had a full watch on deck, and her lights were properly placed and burning brightly. Between 7 and 8 o'clock p. m. of October 21, 1891, the night being clear and the weather fine, she had reached the vicinity of the Kasota piles,—the remains of a cofferdam used in raising the steamer Kasota, which had been there sunk,—which were on the American side, near midchannel, and about three-quarters of a mile above Smith's coal dock, hereinafter mentioned. At this point the Conemaugh received a signal of two blasts of the steam whistle of the steamer Burlington, which was bound down, having a tow of four vessels, and at that time was rounding to at Smith's coal dock, on the American side, for fuel, and exhibiting her masthead and green lights to the watch of the Conemaugh, who also saw the green light of the first vessel in tow as she followed the Burlington around, and cabin lights on other vessels of the tow. The Burlington and tow, in their evolution, formed a crescent whose westerly point was the coal dock, while its easterly end was further up the river and near the Canadian shore. The Conemaugh answered the Burlington's signal with two blasts. Her helm was put hard-a-star-board, her speed immediately checked, and she swung across the stream a short distance below the Kasota piles at an angle of about eight points from her former course. Finding that she was heading above the stern vessel of the tow, the Conemaugh's wheel was steadied and then ported to follow the tow, which in circling around occupied most of the navigable channel, leaving a passage on the Canadian or tow's port side. About simultaneously with the steadying of the Conemaugh, her master saw below the tow, and about a mile away, the white and red lights of an ascending steamer, which proved to be the New York, then somewhat on the American side of midchannel, and promptly gave her a passing signal, of two blasts of her whistle. To this no answer was made by the New York. When the two steamers were about three-quarters of a mile apart the Conemaugh repeated her signal; the New York then showing her masthead and both colored lights. No reply was made by the New York to this second signal. The Conemaugh, still exhibiting only her masthead and green light, and heading about four points towards the Canadian shore from a direct course down the river, sounded a third signal of two blasts; the New York continuing to show all three of her lights, and being then

13

apparently between and close on the port hand of the second and third barges of the tow. The last barge in tow was at this time a little forward of the starboard beam of the Conemaugh, about three lengths—say eight or nine hundred feet—below her, and the same distance from the Canadian shore. The New York made no answer to the Conemaugh's third signal, nor did she reduce her speed. About this time the Conemaugh, still running under check, steadied from the port helm, and almost simultaneously lost the green light of the New York, whereupon she sounded an alarm of several short blasts of her whistle, and put her wheel hard-a-starboard. The New York, running at full speed, was then about midway between the third and fourth barges of the tow, while the Conemaugh had just crossed the wake of the stern barge,—the Ferguson. The two steamers were then on converging courses about a quarter of a mile apart. The Conemaugh kept on at full speed with her wheel hard-a-starboard, showing the New York her masthead and starboard lights only, while the New York came up the river, still at full speed, under a port wheel, displaying her masthead and port lights to the Conemaugh. Just before the collision, which naturally resulted from these courses, the wheel of the New York was starboarded, but too late to avoid the collision, and, stem on, she struck the Conemaugh on the starboard bow, sinking her within ten minutes. The evidence concurs that the vessels came together on the extreme easterly side of the channel, scarcely a length from the place where the Conemaugh sank, and about 900 or 1,000 feet from, and a little on the port quarter of, the Ferguson,—the stern barge of the Burlington's tow. The amount claimed by the libel for the injuries to the Conemaugh, the expense of raising and repairing her, and the demurrage necessary for repairs, together with the damage done to her cargo, is \$70,000. The cross libel alleges that the New York suffered damages to the amount of \$3,000.

The answer of the New York admits that her watch heard neither the first nor second signals of the Conemaugh. It further states that "when the New York had arrived at a point abreast of the last barge in tow of the Burlington a signal of two whistles was heard; but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed intended for some other vessel. * * *" It is also alleged that the speed of the New York in passing the tow was but four miles an hour, but the proofs establish that she maintained double that speed until the vessels came together. The faults of the New York are so many and flagrant that it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation. The admitted facts, that her officers did not even hear the first two signals of the Conemaugh, and, though their attention was challenged to her by her third whistle, did not see her until the alarm whistles were sounded, when the vessels were scarcely a quarter of a mile apart, although the weather was favorable to sight and hearing and the conditions of the locality called for careful navigation, are conclusive that her master and lookout, if she had one, were either incompetent or grossly negligent of their duties. If her lookout saw and reported the lights of the Conemaugh, his exoneration makes the conduct of the master or other officer of the deck, in disregarding that warning, more reprehensible. The Conemaugh's whistle was loud and coarse, and her lights lawfully placed and burning. Nothing can palliate the neg-

ligence which failed to notice either. If the master were at his post, or giving attention to his duties, he should have heard or seen the descending steamer, despite the negligence or even the want of a lookout; for the lights were seen and the signals heard by the crews of the Burlington and her barges, and by persons at the coal dock, who were at a greater distance from the Conemaugh than the New York. Even after the Conemaugh was seen and heard, the action of the New York merits the severest condemnation. Invoking against the Conemaugh steering and sailing rules 19 and 21, the New York neither held her course as required by the first, but by porting thwarted the effort of her adversary to keep out of her way, nor slackened speed, stopped, or reversed, in compliance with rule 21, when the course, position, lights, and alarm whistles of the Conemaugh proclaimed the perilous proximity of the steamers, but kept her speed to the very instant of collision. Under the circumstances, these offenses were scarcely less vicious than the criminal negligence which disregarded the lights and signals of the Conemaugh. The temporary departure of the New York from her general course up the river was necessitated by the position of the Burlington's tow. When she passed that, and saw the Conemaugh, it was her duty to starboard and resume her course as soon as possible, having regard to the exigencies of the situation. The John L. Hasbrouck, 93 U. S. 405-410. There was ample room for her to have obeyed this requirement, which would have taken her under the stern of the Conemaugh. The master of the Conemaugh had a right to expect that this plain duty would have been performed, for his vessel had then crossed the proper path of the New York. A fitter case for the exercise of the disciplinary power committed to the inspectors of steam vessels than that afforded by the navigation of the New York can scarcely be imagined. Revocation of the license of her master, or an extended period of suspension, would have a salutary effect in promoting the safety of life and property on the lakes. The case of the New York is without the shadow of a defense.

Was the Conemaugh guilty of fault contributing to the collision? The argument in her behalf—conceding that if the collision occurred in the proper course of the New York, the Conemaugh must be held in fault, because, having the New York on her starboard side, she failed to keep out of her way—insists that, if she was a safe distance from the New York's lawful course when struck, then her measures to avoid the latter were timely and sufficient, and the New York should be held solely in fault for thwarting, by her unlawful change of course to starboard, the otherwise safe undertaking of the Conemaugh; that the presence of the tow, the distance between the vessels, and their positions and courses when the alarm whistles were sounded, justified the Conemaugh in starboarding to perform her statutory duty under rule 19; and, this granted, the place of the collision is conclusive of the sole liability of the New York. While rule 19 is absolute that the steamer having on her starboard hand another, whose course she is crossing, must keep out of the latter's way, it does not define the course to be pursued to effect that end. To diminish still further the risk of collision between steamers thus approaching, the supervising inspectors, under congressional authority adopted rule 2 of the pilot rules for the lakes and seaboard, prescribing that such steamers "shall pass to the right of each other, as if meeting head and head, or nearly so, and the signals by whistle shall be given and answered promptly,

as in that case specified." In the conditions to which it applies, this rule is to be read into rule 19 of the steering and sailing rules, (Rev. St. U. S. § 4233) Yet, as declared by the inspectors themselves, it is not a rigid and invariable regulation, but is "to be complied with in all cases except when the steamers are navigating a crowded channel, or in the vicinity of wharves, * * *" and is, of course, also qualified by rule 24, (Rev. St. U. S. § 4233,) providing that, in construing and obeying the rules, "due regards must be had to all dangers of navigation, and to any special circumstances which may exist," etc. As it does not absolutely impose on the steamer having another on her starboard hand the duty of porting under all circumstances, it is not inconsistent with the steering and sailing rules. The *Atlas*, 4 Ben. 27; The *B. B. Saunders*, 19 Fed. Rep. 121. These steamers were "navigating in a crowded channel," and that fact exempts the *Conemaugh* from the obligation to port, under pilot rule 2. The *New York*, in coming up, necessarily held her course close to the descending tow, passing within 50 or 100 feet from the fourth vessel, and only attained that distance by a sharp sheer to the starboard when abreast of the *Amaranth*, the third vessel in the tow. At that time the *Conemaugh* was under the stern of the *Ferguson*. She had crossed the *New York's* proper course, and the position of the latter in reference to the *Burlington's* tow left her no room to pass between the *New York* and the tow. There was, moreover, an unobstructed channel, six or seven hundred feet wide, on the starboard side of the *New York*. The *Conemaugh* also had a right to assume that the *New York*, on clearing the tow, would perform her duty, and resume her normal course. The *Free State*, 91 U. S. 204; The *Scotia*, 14 Wall. 170. Under these circumstances, the *Conemaugh*, with three-fourths of the channel occupied by a tow, though crossing the course of the *New York*, was not under the rule of port helm, but might properly continue her course, provided there was time and room for that maneuver. If the case involved only the construction of rule 19, the proofs would be conclusive that the only breach of that rule was committed by the *New York* in failing to pursue her lawful way after passing the tow, but, instead thereof, swinging to starboard, and keeping on until she had overtaken the *Conemaugh*. Had the *New York*, after seeing the *Conemaugh*, even held the course on which she was passing the tow, collision would have been impossible, though she maintained her full speed. But, although the *Conemaugh* had crossed the lawful path of the *New York*, she had not cleared her actual course, which was indicated by the disappearance of the *New York's* green light between the *Conemaugh's* third signal and her alarm whistles. Up to the *Conemaugh's* second signal, her navigation had been cautious, and in exact conformity to the statutory and inspectors' rules. With a full watch, running under check, displaying proper lights, and sounding her whistle seasonably and repeatedly, she had exhausted every effort to herald her appearance, position, and purpose. Even to the giving of her third signal, the only criticism made of her conduct is based on inspectors' rule 3, that, though under check, she was not "slowed to a speed barely sufficient for steerage way," although the vessels had then approached within a half a mile of each other, and no understanding had been established with the ascending boat. This, however, though an infraction of that rule, had no relation to the collision; for the vessels were then so far apart, and on such courses, and held such relative

positions to each other and the tow, that without risk of collision the Conemaugh would have safely crossed the bows of the New York, had the latter held her lawful way. But when the New York shut in her green light, its disappearance announced, and the alarm whistles of the Conemaugh acknowledge, risk of collision, which imposed on each, in their then dangerous proximity, the duty of stopping and reversing. Both were knowingly, under the operation of rule 21, on courses involving risk of collision. The fact that the New York had not responded to either signal, but was drawing near at full speed, with the eyes and ears of her watch closed to the presence and purpose of the Conemaugh, despite the warnings of her lights and signals, called for the extremest precautions on the part of the latter, and should in some measure have prepared her for the necessity of their instant adoption.

It is said that the silence of the New York was not conclusive evidence that she had not heard the signals of the Conemaugh; for notwithstanding pilot rule 6 expressly requires that passing signals by whistle shall be given and answered "at all times when steamers are passing or meeting at a distance within half a mile of each other, and whether passing to starboard or port," the rule, it is matter of common knowledge, is often violated, despite the fact that failure to obey it has frequently been held the ground of condemnation of the offending vessel. *The B. B. Saunders*, 19 Fed. Rep. 118; *The Garden City*, Id. 533; *The W. H. Beaman*, 18 Fed. Rep. 334.

The presumption of law, however, is that the nonobservance of the rule by the New York was not willful. Moreover, under no circumstances should the prevalence of this illegal practice be received to excuse noncompliance with rules 21 and 24 of the steering and sailing rules. If it was prudent to check speed when approaching a tow moving in the same direction, the necessity of still greater care when she was about to meet and cross the course of a steamer rushing up the river at full speed, in evident ignorance of the presence of a descending vessel, was infinitely more obvious and urgent. Though not called upon to stop when no response was made to her passing signal, because she had the tow between herself and the New York, and there could be no collision while that was the case, yet, when the Conemaugh emerged from that shelter, she did so with knowledge, or at least reason to believe, that her presence was unknown to the New York, and that the safety of her advance was contingent on the latter's adherence to her course, which, though probable, was not assured, because the Conemaugh apparently was not a factor in her navigation. The Conemaugh, therefore, could not safely proceed in the expectation that the New York would obey rule 19, and hold her course, in the absence of knowledge on her part that there was a vessel in the vicinity to whom she owed that duty. The steering and sailing rules governing the course of vessels meeting in various situations contemplate that each knows the facts upon which it is called to act. If one alone has that knowledge, and perceives, or has reason to believe, that the other has not, she cannot justify proceeding on the course prescribed for the situation, and, in the event of a collision, ask the determination of the controversy by the rule of that course alone, regardless of the cognate rules of navigation. These rules are all qualified by rule 24, which enjoins due regard to the dangers of navigation, and special circumstances rendering departure from them neces-

1107

sary to avoid immediate danger. There could scarcely be a greater "danger of navigation" than a large steamer approaching at full speed in the nighttime, in apparent ignorance of the presence of another. Each of such vessels is a menace to the safety of another, because their co-operation to a safe course is impossible. Under such circumstances, rules 21 and 24 are of paramount force. They condemn the effort of the *Conemaugh* to cross the bows of the *New York* without first obtaining recognition, and for failing to stop and reverse in so grave a peril as that produced by the *New York's* speed and change of course; and they and rule 19 condemn the *New York* for changing her course, and failing to stop and reverse when she saw the *Conemaugh*. In such a situation, failure to stop and reverse is an almost unpardonable sin against the maritime code. *The Manitoba*, 2 Flip. 241; *Id.*, 122 U. S. 97, 7 Sup. Ct. Rep. 1158; *The Stanmore*, 10 Prob. Div. 135; *The D. S. Gregory and The Washington*, 2 Ben. 226, 236. It is strongly urged that this error has nothing to do with the disaster. That conclusion would require for its support clear proof, not merely that the violation of rule 21 did not probably, but could not have contributed to the collision. *The Pennsylvania*, 19 Wall. 125; *The Fenham*, L. R. 3 P. C. 212; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 422, 10 Sup. Ct. Rep. 934. The proofs have not this force, but leave it at least doubtful whether the *Conemaugh* could have been stopped in time to avert the collision. The master, whose ingenuous and straightforward manner on the witness stand commends his testimony, frankly stated that he could not say whether or not that could have been done. The fact that the *Conemaugh* was struck abreast of the pilot house, about 30 feet abaft her stem, is persuasive at least that, had she stopped, she would have escaped the blow inflicted by the *New York*, though the *New York* might not have been so fortunate. The severe rule which makes the transgression of the statute *prima facie* a contributory cause is, however, not infrequently relaxed; and the most forcible consideration urged for the acquittal of the *Conemaugh* is founded on the indulgence of the courts to an error committed by a vessel which has been brought into immediate jeopardy by the fault of another. In such a case the injured party is not debarred from the recovery of damages if his vessel has done something wrong, and has not been maneuvered with perfect skill and presence of mind. Instances of application of this doctrine are: *Steamship Co. v. Rumball*, 21 How. 383; *The Nichols*, 7 Wall. 656-666; *The Carroll*, 8 Wall. 305; *The Elizabeth Jones*, 112 U. S. 526, 5 Sup. Ct. Rep. 468; *The Maggie J. Smith*, 123 U. S. 355, 8 Sup. Ct. Rep. 159; *The Blue Jacket*, 144 U. S. 371-391, 12 Sup. Ct. Rep. 711; *The Bywell Castle*, 4 Prob. Div. 219.

The argument is that the effort of the *Conemaugh* to keep out of the way by starboarding was justified by the circumstances which constitute the exception to pilot rule 2, namely, the obstruction created by the tow, and the danger of her attempting to pass between it and the *New York*, and, as the *Conemaugh* had met every requirement of prudence and the rules of navigation up to the instant of the *New York's* unlawful change of course, her failure to stop and reverse in the sudden emergency thereby produced should be held error in extremis. If the *Conemaugh* had come up in a position in which she was passing when the *New York* ported under assurances from the latter that the *Conemaugh's* presence was known, it might well be claimed that the cir-

cumstances disarmed the master of the latter of suspicion of danger, and entitled the Conemaugh's advance to the most lenient judgment. But such was not the case. The very vigilance of the Conemaugh as she neared the path of the New York recognized the danger of the situation before the New York ported, and her master frankly admits that after she ported he thought "there wasn't much chance to get away from her," when the Conemaugh starboarded hard just after sounding her alarm whistles. The apprehension that, if the New York should accept and act upon the passing signals by stopping and reversing, the Conemaugh would have been "in the road of the New York," cannot be admitted to justify the failure to take that precaution. There was nothing to suggest the probability of such action on the part of the New York, but on the contrary her actual course negated the supposition. There could be but one result if both vessels persisted in going ahead. Every instant of advance made this more manifest. Stopping, if not an assurance of safety, was manifestly less dangerous than a race for the point of intersection, which at furthest was not more than 700 feet away. It is true that a master is entitled to have time to comprehend the exigencies of the situation before he can be held to have transgressed its law; or, to quote the language of the court in *The Emmy Haase*, 9 Prob. Div. 81, approved in *Maclaren v. Campagne Francaise*, L. R. 9 App. Cas. 649, and *The Beryl*, 9 Prob. Div. 137, 138: "A man must have time to consider whether he should reverse or not. The court is not bound to hold that a man should exercise his judgment instantaneously. A short—but a very short—time must be allowed for that purpose." The time, however, must be measured, not by the watch, but by the circumstances. The conditions in this case, preceding the New York's change of course, were, as has been said, preparatory and cautionary. They so plainly forbade experiment that the duty of stopping and reversing needed no consideration. It seems to me it should have occurred to the officer on deck before his vessel had run a length. The equities of the case are so strongly in favor of the Conemaugh that the conclusion that she was also in fault has been reached with reluctance, and not without considerable doubt, in view of the extent to which adjudged cases of high authority have gone in referring collisions, in circumstances not unlike these, solely to the fault of the flagrant transgressor. The great disparity of fault has invited and received the consideration it merits. But the impossibility of enforcing the great commandment of the law of navigation which calls a halt when risk of collision is involved, compels me to adjudge both vessels at fault; and a decree will be entered to that effect, and the usual order of reference to a commissioner to ascertain and report damages. The costs will be equally divided.

EXHIBIT "B."

Opinion of District Judge on rehearing, filed May 16, 1895.

(Record p. 227.)

Upon the hearing of this case, the court found both vessels at fault for the collision, and accordingly referred it to a master to ascertain and report the damages in the cause. The reasons given for that conclusion are stated in the case of *The New York*, 53 F. R., 553, and were reached as there stated, with considerable doubt as to their correctness. A rehearing was had upon the petition of libellant and the matter was taken under advisement before the court. A careful re-examination of the testimony in the case, the admitted circumstances attending the collision and the rule of law applied by the Supreme Court of the United States, since the former decision of this cause, have satisfied me that in holding both vessels at fault, too harsh a judgment was passed upon the conduct of the master of the *Conemaugh* in holding that vessel in fault for the failure to stop and reverse, instead of going ahead at full speed in its efforts to escape the *New York*.

The answer and cross-libel filed by the owners of the *New York* says: "While passing under the stern of this barge (the *Ferguson*), and not more than ten or twenty feet from here, several short blasts of the whistle of the propeller, which proved to be the *Conemaugh*, were heard close at hand and not more than one hundred feet away. The *Conemaugh* pursued her course directly across the bows of the *New York*, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the *New York*, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm." This admission was not called to the attention of the court at the first argument of the cause, and although it states the distance between the vessels at the time of the alarm signals by the *Conemaugh*, at less than that found by the court, its significance is—whatever that distance may have been—that at the time those alarm signals were sounded, the collision was confessedly inevitable. The *New York* was ascending the river at a speed of ten miles an hour. The *Conemaugh* was running at half that speed, and up to this time, had been navigated with great circumspection. When these signals were sounded the vessels were probably not to exceed 1,200 feet apart, and would cover that distance in less than one minute and in so doing, the former finding of this court was that the proofs "leave it at least doubtful whether the *Conemaugh* could have been stopped in time to avert the collision."

This conclusion—that is the doubt which it admits—require under the latest decisions of the Supreme Court, the acquittal of the *Conemaugh*.

As found in the former opinion, there would have been no collision had not the *New York* unlawfully changed her course upon being apprised of the proximity of the *Conemaugh*. This error superadded to the many and flagrant prior faults of the *New York*'s navigation, should be held solely responsible for this collision.

In the case of the *City of New York*, 147 U. S., page 85, the language of Mr. Justice Brown, who delivered the opinion of the court, is most opposite to the facts of this case. He there says—speaking of the collision between a steamer and a sailing vessel: "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel, should be resolved in its favor." While this doctrine is not new, and many cases are cited in the opinion filed in this cause, expressing the same rule of judgment, it is an application of that rule under circumstances much less excusatory of the acquitted vessel than those which mark the collision in this cause. While it is true, as stated in our former opinion herein that the conditions preceding the *New York's* change of course, were preparatory and cautionary, and it was because of that fact that the *Conemaugh* was adjudged in fault for not stopping and reversing, in the light of all the circumstances and in view of the grossly negligent navigation of the *New York* when contrasted with the generally cautious management of the *Conemaugh*, and the perilous emergency in which the latter was placed by the wrong doing of the *New York*, justice to the *Conemaugh* requires the application of the rule which I reluctantly declined to follow in the former opinion that where a vessel, which has been brought into immediate jeopardy by the fault of another, the injured party is not debarred from the recovery of damages if his vessel has done something wrong and has not been maneuvered with perfect skill and presence of mind. The proof of the *Conemaugh's* complicity in wrong doing is not "clear and convincing" and she ought not to be held.

The case of the *Alexander Folsom*, 52 F. R., 403, is another instance of the application of the rule similar to that of the *City of New York*, 147 U. S., page 85, where the reasons for holding the error committed by one of the vessels in a collision as pardonable because in extremis were no more cogent than here.

This conclusion requires that the former decree in this cause be vacated and that a decree be entered herein, holding the *New York* solely in fault for the collision, and that the reference heretofore ordered in this cause be proceeded with for the ascertainment of libellant's damages, including the damages suffered by the petitioners, who have intervened in the cause, and that the cross-libel of the owner of the *New York* be dismissed with costs.

(Signed) HENRY H. SWAN,
District Judge.

EXHIBIT "C."

Opinion of the Circuit Court of Appeals.

(82 Fed. 821.)

TAFT, Circuit Judge (after stating the facts). We must first decide what are the rules of navigation to which the colliding vessels were obliged to conform. The collision occurred in Canadian waters, and it is contended by counsel for the appellee that the Canadian statute of navigation must govern the court in consideration of the conduct of the parties. It is settled by the decisions of this court in *The North Star*, 22 U. S. App. 242, 10 C. C. A. 262, and 62 Fed. 71, and *The City of Mackinac*, 43 U. S. App. 190, 20 C. C. A. 86, and 73 Fed. 883, that, in the absence of the proof of the Canadian statute, the proper navigation at the time of this collision was prescribed by section 4233 of the revised statute of the United States, as supplemented by the rules adopted by the supervising inspectors under the authority of section 4412, revised statutes. It is conceded that at the hearing in the court below the Canadian statute was not introduced in proof, and that neither the counsel nor the court relied on its provisions. It is also apparent from the evidence that the captains of the colliding vessels both regarded themselves as acting under and subject to the federal statute and the supervisors' rules at and before the time of the collision. At the hearing of the motion made by the libelant for a rehearing and a modification of the decree so as to hold the *Conemaugh* free from fault, some reference seems to have been made to the Canadian statute. This we gather, not from the record, but from the affidavits of the counsel for libelant, and the clerk of the district court, filed in support of a motion for a certiorari. From the affidavit of the clerk it is to be inferred that the reference to the Canadian statute was only *arguendo*, and that there was no formal offering of the same in evidence. Indeed, it is difficult to understand how there could have been an offering of the same as evidence upon the issue made on the pleadings, because the action of the court in modifying the interlocutory decree seems to have taken on the evidence as adduced at the trial, and without a new hearing of the cause. The motion of libelant for rehearing asked for leave to introduce new evidence, but the Canadian statute was not mentioned in the description of the evidence to be offered. The respondent asked leave to introduce new evidence after the court had modified the decree, and this was denied. Now, the respondent had stood upon the evidence of libelant at the trial, and had adduced no evidence of its own. If the libelant had been permitted, on a rehearing, to introduce the Canadian statute, and to change materially the rules of conduct to which the parties were to be held, then it would seem hardly fair not to have allowed the respondent to call its witnesses to meet a different case from that in which it had not deemed it necessary to call any one. But, disregarding these considerations, the conclusive reason why the court can not consider the Canadian statute as part of this record is found in the return of the district court to the writ of certiorari. It contains no certificate that the Canadian statute was made part of the record by being offered and received in evidence, but only a statement by the clerk that that which is returned is a correct copy of the Canadian statute, as

published. The district court and the clerk seem to have construed the action of this court in issuing the writ as a decision or finding that the Canadian statute was a part of the record below, and an order to certify the same, whereas the writ merely directed the court to complete the record if, in any respect it was defective, leaving to that court to decide what constituted its record. We cannot regard the Canadian statute, therefore, as in evidence, or as part of the record before us. It might have been a question, even if the Canadian statute had been properly proved, whether two merchant vessels of the United States, proceeding from one port of the United States to another, and incidentally crossing and recrossing the national boundary, were not, though in Canadian waters, still to be held by a court of the United States as bound by section 4233, the opening words of which are as follows: "The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States." We do not decide this point, because, though suggested by counsel, it is not before us. All that we do hold is that, in the absence of the proper proof of the Canadian statute, the presumption is that section 4233 and the supervising inspectors' rules furnish the law of navigation for the cause.

It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side. Under such circumstances, by rule 19 of section 4233, Rev. Stat., the Conemaugh was required to keep out of the way of the New York; and by rule 23 the New York was required to keep her course, unless, as provided in rule 24, special circumstances existed, rendering a departure from rule 22 necessary to avoid immediate danger. Rule 2 of the supervising inspectors further limited the discretion which the Conemaugh had in selecting the manner in which she could keep out of the way by providing that when steamers were approaching each other in an oblique direction, as these were, they should pass to the right of each other, as if meeting "head and head," or nearly so. The learned district judge was of opinion that rule No. 2 did not apply in this case, because he thought the situation here was within an exception to rule 2 stated in a note to the supervising inspectors' rules, by which all the rules are made inapplicable to steamers navigating in a crowded channel. In this we cannot agree with him. The width of the navigable channel between the tow and the Canadian shore before and at the time of the collision, was variously estimated as from 500 to 750 feet. For reasons which we shall hereafter state, we think it was about 500 feet. The Conemaugh had not entered that channel, but was above it in the river at least 300 feet. She had the whole width of the river on her starboard hand, and had full opportunity to port her helm and run down into the bight of the tow, out of any danger, had she desired to do so, and this with very little delay. Had she done this, there would have been no collision. It follows that she was guilty of a fault which caused the collision. We should have reached this conclusion even if the Conemaugh was not bound by rule 2 of the supervising inspectors, and was only under obligation to keep out of the way of the New York, with discretion to pass her on either hand. The evidence satisfies us that the Conemaugh was in the course of the New York when the collision occurred. What was the course of the New York? Her general course was upstream, and probably, if she followed the usual track

of steamers (though this was not invariable,) a little towards the American side of midchannel. It is well settled, however, that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence and must allow for the effect. *The Iron Chief*, 22 U. S. App. 473, 11 C. C. A. 196, and 63 Fed. 289; *The John L. Hasbrouck*, 93 U. S. 405; *The D. S. Stetson*, 4 Ben. 508, 7 Fed. Cas. 1132; *The John Taylor*, 6 Ben. 227, 13 Fed. Cas. 896; *The Velocity*, L. R. 3 P. C. 44; *Mars. Mar. Coll.* (2 Ed.) 473.

The proper course of the *New York* was that which the *Conemaugh* ought to have known she would naturally have taken had the *Conemaugh* not been in sight. As the *New York* came up the river the *Burlington's* tow was stretched across the river, and by an exchange of single blasts a proper agreement had been reached, by which the *New York* was obliged to go round the tail of the tow, having it on her port hand. This required the *New York*, coming up on the American side of the channel, to port her wheel and change her course toward the Canadian shore. As she was about a mile distant when the signals were exchanged, it is highly probable that she could not, in a dark night, at once determine the length of the tow, or fix the place of the last barge in it. It was entirely natural and proper navigation for her to change her course only moderately to starboard until she could pick up the tail of the tow, and avoid going uselessly near the Canadian shore, and more out of her general course up the river than necessary. The evidence shows, then, that after first porting her wheel, she ran on a course which would have carried her into the *Amaranth*, the third barge in the tow; that when about 800 feet away she ported again, and took a course which was about parallel with the then course of both the *Amaranth* and the *Ferguson*, the last two barges of the tow, and 100 feet distant therefrom, towards the Canadian shore. Their course was about two or three points towards the American shore from the course of the river and channel, and so the course of the *New York* was then two or three points from the midchannel line towards the Canadian shore. The great weight of the evidence establishes that the *New York* did not again change her course to starboard after she ported her wheel 800 feet away from the tow to pass the last two barges. The libel charges that when near the last barge she ported her wheel and swung violently to starboard, and thus brought about the collision. We think the evidence utterly fails to show this, and that she made no change of her course to starboard which the presence of the tow, sagging downstream, and slowly crawling across the river, did not make necessary. But it is said that after the *New York* passed the tow her proper course was to swing to port under the stern of the last vessel in the tow, and thence over toward midchannel, instead of which she continued on towards the Canadian shore, and ran into the *Conemaugh*. It is undoubtedly true that the *New York's* proper course, after passing the tow, was to resume her general course upstream near midchannel. *The John L. Hasbrouck*, 93 U. S. 405. All the witnesses who observed her course admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port; and the only question is, did she begin to do this as soon as she ought to have done it? How soon ought she to have done it? She was not obliged to turn a sharp corner round the stern of the last barge on the tow. She certainly would not have done this had the

Conemaugh not been there, and, as we have seen, her proper course could not be affected by the fact of the Conemaugh's presence. Her natural course would have been to swing gradually to port under a slowly-turning starboard wheel, so as to make an easy sweep back to midchannel. The Conemaugh could not, by pressing on it, make the course of the New York one requiring her to dodge in between the tail of the tow and the Conemaugh. In answering the question whether the actual course of the New York was in accord with her proper course thus stated, we may derive considerable light from the evidence as to the distance of the New York and the Conemaugh from the tow when the collision occurred. The captain of the Conemaugh says the distance was 750 feet. The captain of the Ferguson puts it at about the same distance. The mate of the Conemaugh makes the distance about 300 feet, and this is the effect of the evidence of the captain of the Amaranth. We are of opinion, from the circumstances in the case, that the smaller distance is much more likely to be correct. An examination of the chart shows that the distance which the Conemaugh was from the tail of the tow, when her engines were checked, did not exceed 1,200 feet. The statement of her engineer as to the time between that check and the collision was about four minutes. The relative speeds of the Conemaugh and the tow were such that the former was gaining on the latter at least three miles an hour. Allowing for the curved course the Conemaugh took in following the tow down, and allowing half a minute between hard a-starboard swing of the Conemaugh and the collision, she must certainly have been within three hundred feet of the tow when the swing occurred. But it is said that this conclusion is at variance with the place where the Conemaugh grounded on the channel bank. The weight of the evidence shows that the distance of the tow from the Canadian shore was about 750 feet. The channel bank was about 235 feet from shore. This left the channel between the tow and the bank about 515 feet. It is not clear just how much time there was between the starboarding of the Conemaugh's wheel and the collision, but it is quite evident that there was some time in which to make headway towards the Canadian shore, and after the collision the evidence is that the engines of the Conemaugh worked ahead strong for a minute or more. This is quite sufficient to show that the Conemaugh might have starboarded her wheel at a point about as far from the shore as was the tow, and though when she blew her alarm signal she was but 300 feet from the tow, that after being struck by the New York, and working hard towards the Canadian shore, she might have brought up on the bank at a point much further than 300 feet from the position of the tow, which had been constantly moving away from the point of collision. With the distance between the Conemaugh and the tow but 300 feet, where was the course of the New York with respect to them? It is clear to us that the course of the New York would not naturally be confined to swinging on her starboard wheel through the passage not much wider than her length. That would not have been the easy sweep which she was entitled to make in turning back towards midchannel. The Conemaugh, therefore, being where she was, was either in, or dangerously near, the course of the New York, and was not keeping out of her way. More than this, she increased her fault by throwing herself right across the bows of the New York. The point where the New York struck her, to-wit, only 30 feet from her stem, shows that if, when she blew her alarm whistle, she had ported her helm,

instead of starboarding, she would have entirely avoided the New York by passing that vessel port to port. It is very difficult to explain the navigation of the Conemaugh, or to reconcile some of the statements of the captain of the Conemaugh with the admitted situation of the vessels. He says that when he steadied, after swinging round the Kasota spiles and heading across the river, he saw the red light of the New York coming up the river, and whistled two blasts to her; that as he swung slowly around on his port wheel, following the tail of the tow, he saw both side lights of the New York; and that he continued to do so when he whistled his second signal of two blasts and his third signal of two blasts. An examination of the chart and the necessary courses of the two vessels makes it impossible that he could have seen the green light of the New York from the second to the third blast. The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light. We did not hear in the argument of counsel, nor can we find in the briefs, any explanation how both lights of the New York were so long visible to the Conemaugh as her captain testifies. The other witnesses from the Conemaugh differ with the captain as to the lights shown by the New York. Hogan, the mate, saw only her red light at the time of the third signal, and Crowe saw her red light immediately after the second signal. The only importance of this error in the testimony of the Conemaugh's captain is that it shows that the porting of the New York's wheel twice in her course from the American side to the tail of the tow must have been evident to him before there was any danger of collision. Another circumstance of much significance in this case, the course of the Conemaugh with respect to that of the two last barges of the tow. Both barge captains say that for some time before the third signal blast they saw both side lights of the Conemaugh. Now, this is only possible if the Conemaugh, instead of crossing their wake, was following along in it for an appreciable time while she was blowing the last one, and probably the last two, of the signals to the New York. It thus appears that, while she was blowing signals indicating a purpose to pass the New York starboard to starboard, she was continuing on a course port to port of the New York. It is not explained why, if the captain of the Conemaugh regarded himself as having the right to select his course, and intended, as he says he did, to pass on the Canadian side of the New York, he did not direct his vessel towards the Canadian shore at once, instead of following the tow down on the American side of the course which the New York must follow to clear the barges, and then suddenly swinging across the bows of the New York when that vessel was so near that collision was inevitable. On the whole case, we are clear in the conclusion that there were several glaring faults in the management of the Conemaugh which caused the collision.

The question remains, was the New York also guilty of faults in navigation contributing to this collision? Her owner, in its answer, admitted that those in charge of her neither saw nor heard the Conemaugh until the third double-blast signal, and that then they only heard the signal, without seeing the vessel giving it, and so supposed that the signal was not intended for them. The witnesses for the Conemaugh unite in saying that the New York was going at a speed of 10 miles an hour, and apparently not under check. The district

court found, from her failure to see and hear the Conemaugh, that the New York's lookout was defective, and that she thus committed the fault of not answering the Conemaugh's signals. He further held that she should have checked or stopped when there was risk of collision, and that her failure to do so was a fault contributing to the disaster. It must be conceded that, if the New York had heard the signals of the Conemaugh, she would not have been obliged to respond by a double blast, and signify her willingness to pass starboard to starboard, instead of port to port. Under rule 2 of the supervising inspectors, the Conemaugh was obliged to keep on the New York's port hand, and nothing but her consent—expressed in a double blast—to depart from the rule would justify the Conemaugh in assuming that consent. This was not a case where silence gave consent. Rule 2 requires signals to be given and promptly returned. It has been suggested that this requirement of a prompt answer applies only to the case where the first signal is to indicate a compliance with the rule, and not, as in the case at bar, where the signal invited a departure from it. This suggestion finds some support, it is said, in the language of Mr. Justice Brown in the Delaware, 161 U. S. 459, 16 Sup. Ct. 516, where, speaking for the supreme court, he limits the use of signal blasts by the preferred vessel of two crossing vessels to an announcement that she is maintaining her course according to rule. The learned justice said :

“ These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on, or nearly end on ; and the signals therein provided for are designed to apprise the approaching vessel of the intention of the steamer giving the signal to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her.”

We do not find it necessary to decide whether the New York should have returned a signal of one blast or not, because it is clear to us that her failure to do so did not contribute to the collision. So far as the Conemaugh was concerned, the New York's silence was exactly equivalent to her express refusal to consent to depart from the rule by a single blast. There are several cases in which the point has been decided. The *John King*, 1 U. S. App. 64, 1 C. C. A. 319, and 49 Fed. 469, was a case of crossing vessels, in which the preferred vessel was condemned by the district court for not promptly returning an answer to a signal inviting her to depart from rule 2. The circuit court of appeals of the second circuit reversed this decree, and Judge Wallace, in delivering the opinion of the court, said, referring to the other vessel :

“ It was her duty, under sailing rule 19, to keep out of the way, and the duty of the ferryboat to keep her course. The red light of the ferryboat was plainly visible to the propeller, and there was nothing in the way to prevent the latter from passing astern of the ferryboat. She had concluded previously to pass across the bow of the ferryboat, but had received no consent from the ferryboat to such a course, and there was still time to abandon that purpose and go astern. The latter course

27

was plainly safe; the former, doubtful; and, quite irrespective of any rule of the supervising inspectors, common prudence required her to adopt the safe course and pass astern. She cannot invoke the aid of any rule of the supervising inspectors to justify her departure from duty without showing that her proposition to depart was heard, understood, and accepted by the ferryboat. If, by her signals, she invited a departure from the ordinary rules of navigation, she took the risk, both of her own whistles being heard, and, in turn, of hearing the response, if response was made."

Again Judge Wallace says, speaking of the ferryboat:

"The signal she gave to the propeller when she got out into the river was the proper signal, viz. one blast, to indicate that she proposed to keep to the right. If she had heard the second signal of the propeller, she could have done no more by way of a proper answer and would have been under no obligation to give a different signal. This signal was given at a time when there was yet opportunity for the propeller to alter her course to starboard and pass astern. If we should assume that she heard the propeller's signal, or ought to have heard it, and should have answered it by two blasts of her whistle, we do not see how the propeller was misled by the conduct of the ferryboat. We do not think, however, that, if the ferryboat had heard the propeller's signals, her failure to answer them would have been culpable. The case, in its legal aspects, is quite similar to that of *The B. B. Saunders*, 23 Blatchf. 383, 25 Fed. 727, in which the court used this language: 'Notwithstanding the inspectors' regulations, therefore the pilot of the *Saunders* was not bound to assent to the movement proposed by the *Orient*, unless due regard to the particular circumstances of the situation required a departure from the ordinary rule. Consequently, his failure to answer the signal of two blasts of the whistle from the *Orient* was not culpable, unless it was apparent that the *Orient* could not safely pass astern of the *Saunders*.'"

See, also, the *Florence*, 68 Fed. 940; *The St. John*, 7 Blatchf. 220, Fed. Cas. No. 12,224; *The Milwaukee*, Brown, Adm. 313, Fed. Cas. No. 9,626.

It is manifest to us that the failure of the *New York* to respond by a one-blast signal to the two blasts of the *Conemaugh* had no causal relation to the collision, because the silence of the *New York* was full notice to the *Conemaugh* that she must obey rule 2.

Again, how did the *New York*'s failure to see the *Conemaugh* contribute to the collision? Suppose the *New York*'s lookout had seen every maneuver of the *Conemaugh*, would her course have been different from what it was? We do not think so. She had the right and duty to maintain her course, and that we have found that she did. She would have had no right to infer that the *Conemaugh* would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the *Conemaugh*, not having established an agreement to pass starboard to starboard, would maintain her bearing to the port of the *New York*, and swing clear on that side. Especially in this case when, if she had seen the *Conemaugh*, she would have observed her swinging slowly to the port of the *New York*, in the wake of the barges in the tow, although blowing signals of her

intention, if assented to, to change her course to the starboard of the New York. But it is said she ought to have stopped and reversed when there was risk of collision. The only risk of collision would have been in the Conemaugh's failure to keep to the port hand of the New York, and this failure she was not bound to anticipate. The law on this subject has been settled by the supreme court in *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795 and *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516. In the latter case Mr. Justice Brown, speaking for the supreme court, used this language :

"The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the nineteenth rule of the original International Code (Rev. St. § 4233), and the of sixteenth rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and perhaps of American, authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be in extremis, he is bound to hold to his course and speed. The cases of *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, and *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both which would bring about more collisions than it would prevent. *Belden v. Chase*, 150, U. S. 674, 14 Sup. Ct. 264; *The Highgate*, 62 Law T. (N. S.) 841, 6 Asp. 512."

This clearly shows that the New York had the right to maintain her speed, as well as her course, unless there was to her some distinct

indication that the Conemaugh was not going to keep out of her way by porting. She received no such distinct indication until the Conemaugh suddenly starboarded her helm and swung across the fast-approaching bows of the New York, and then it was too late to avoid the catastrophe. We find, then, that it was the fault of the Conemaugh which alone caused this collision, that the libel of her owner should therefore be dismissed, and that on the cross libel of the owner of the New York a decree in personam against the owner of Conemaugh for the agreed damage to the New York should be entered. This conclusion disposes also of the petition of the intervening insurance companies, which must also be dismissed. The decree of the district court is therefore reversed, with directions to enter a decree in accordance with these conclusions.

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THE IRON & WOODEN STEAM
NAVIGATION COMPANY, owners of
the Propeller "New York".

THE BRITISH AMERICA
MARINE INSURANCE COMPANY
Limited.

THE UNION MARINE INSURANCE
COMPANY.

THE INSURANCE COMPANY OF
NORTH AMERICA, and the
MARINE INSURANCE COMPANY
Limited, Intervening Underwriters.

THE UNION STEAMBOAT COM-
PANY, owner of the Propeller "New
York".

Respondent.

Application for Writ of Certiorari to the United States Circuit
Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS.

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1904.

The Supreme Court of the United States.

THE ERIE & WESTERN TRANSPORTATION COMPANY, owner of the Propeller Conemaugh,

THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, Limited,

THE UNION MARINE INSURANCE COMPANY, Limited,

THE INSURANCE COMPANY OF NORTH AMERICA and the MARINE INSURANCE COMPANY,

Underwriters on Cargo,
Petitioners.

vs.

THE UNION STEAMBOAT COMPANY, owner of the Propeller New York.

Respondent.

On Petition for Writ of Certiorari.

BRIEF IN SUPPORT OF PETITION.

The questions involved in this case are of general importance. They interest not only the parties involved in this litigation, but also all who are engaged in the vast commerce of the lakes, and therefore justify us in asking this Court to issue its writ of certiorari that the questions may be settled by its supreme authority.

These questions may be thus stated:

1. Do the laws of the United States and the rules of navigation prescribed by the Supervising Inspec-

tors have any extra-territorial effect; and do they apply in cases of collision between American vessels when navigating the waters of the Dominion of Canada, and beyond the territorial limits of the United States?

2. Will a Court of Admiralty in this country, in cases of collision occurring in Canadian waters, take judicial notice of the Canadian law prescribing regulations for prevention of collisions, or must such law be shown by technical proof?
3. Do the international rules and regulations prescribed by the Act of March 3, 1885, 23 Stat., 438, which were in force at the time this collision occurred, apply to the Great Lakes and connecting waters, or are those lakes and waters to be considered lakes and inland waters of the United States, and so excepted from the operation of said Act of 1885, and therefore subject to the rules prescribed by Sec. 4233, R. S., and the rules of the Supervising Inspectors?
4. If Inspectors' Rule 2 is valid and applicable to steamers meeting on crossing courses in the manner in which the Court of Appeals finds that the Conemaugh and the New York were approaching each other, does it require the obligated vessel in every case to port and pass astern of the other, or may she keep out of the way by passing ahead or astern of the other, at her option?
5. If the laws of the United States and rules of the Supervising Inspectors apply to American vessels while navigating the waters of Canada, and beyond the territorial limits of the United States, is it the duty of the privileged vessel to answer the signals of the other, or may she disregard such signals, although the two vessels are approaching

each other so as to involve risk of collision, and such signals, which are repeated several times, indicate the intention of the other vessel to cross the bows of the privileged vessel?

6. If two steamers are approaching on crossing courses so as to involve risk of collision, and the one whose duty it is to keep out of the way indicates by her signal lights and by her whistle her intention to cross the bows of the privileged vessel, is such privileged vessel justified in changing her course so as to thwart the movements of the other, because of the intervention of a third vessel, moving across the course of the privileged vessel, and which the privileged vessel might avoid by temporarily checking or stopping?
7. If two steamers are approaching each other in the nighttime on crossing courses so as to involve risk of collision, is the privileged vessel justified in holding her course with unabated speed, without a lookout, after the steamer whose duty it is to keep out of the way has indicated her intention to pass ahead by signals of two blasts of the whistle, which are repeated several times, and which would have been heard by the privileged vessel if a proper lookout had been maintained?
8. If two steamers are approaching each other on crossing courses so as to involve risk of collision, and the one which has the other on her starboard bow indicates by her signal lights and by her whistle, that she intends to cross the bow of the privileged vessel, is such privileged vessel justified in changing her course so as to thwart the movements of the steamer whose duty it is to keep out of the way, because of the intervention of another vessel moving across the course of the privileged

vessel, or is it the duty of such privileged vessel, under the circumstances, to check or stop until such intervening vessel has moved out of the way?

I.

As to what law is to be applied in cases of collision between American vessels when navigating in Canadian waters outside of the territorial limits of the United States.

The law of Canada in cases of collision differs from the law of the United States in some important particulars. There is no Canadian law or regulation which corresponds to our Supervising Inspectors' Rule 2, which, as construed by the Circuit Court of Appeals, requires that when steamers are approaching each other on crossing courses, the one that has the other on her starboard side shall port and go astern of the other.

All American vessels navigating between the upper and lower lakes are compelled at times to pass through Canadian waters. There is a large number of Canadian vessels engaged upon the lakes and their number is constantly increasing.

Does an American vessel carry the laws of the United States with her when she passes out of the territorial jurisdiction of the country? Is she still bound by the Supervising Inspectors' Rules when she is not navigating the waters of the United States?

Must she conform to these regulations when she is meeting an American vessel in Canadian waters, and not conform to them when she is meeting a Canadian vessel? How is she to know, especially in the nighttime, whether the approaching vessel is American or Canadian? Such vessels have the same general appearance. They are built

alike; they carry the same lights. How is the navigator to know what regulations he must conform to, unless the question is to be determined by the waters in which he is navigating?

Is not this a matter of sufficient general importance to demand the attention of this Court and to justify it in issuing the writ of certiorari in this case?

The general rule is that the municipal regulations of one country have no extra territorial effect; and that the wrongfulness of the conduct complained of as a cause of action in tort, is determined by the *lex loci* and not by the *lex fori*.

1 Jaggard on Torts, 102.

Northern Pacific R. R. Co. vs. Baedock, 154 U. S., 190.

This principle has been recognized in collision cases.

Smith vs. Condry, 1 How., 28.

The China, 7 Wall., 53.

The M. Moxham, 1 P. D., 107.

Marsden on Collisions, Secs. 208-216.

Carver on Carriage by Sea, p. 730, after quoting from the British statute that in cases arising in any British court concerning matters happening within British jurisdiction, foreign ships, so far as regards regulations for preventing collisions, shall be treated as if they were British ships, adds: "*Where the collision has taken place within a foreign jurisdiction the rule is different.*"

In the *M. Moxham*, above cited, James, L. J., said:

"If I take my coachman to France, and he, in driving, injures a carriage in France, I do not take with me the law of *respondet superior* so as to make me liable. * * * Again: If by the law of the foreign country, a particular person is justified or is excused * * * he will not be answerable here."

By the general maritime law, by the law of England and by the law of Canada, a ship whose duty it is to keep out of the way of another may go ahead or astern of the other, and according to this law, the Conemaugh was justified and had the right to cross the bows of the New York.

Marsden on Collisions, 411.

The Nor. 2 Asp., 264.

But the Circuit Court of Appeals held that the Conemaugh, under Inspectors' Rule 2, was bound to port and pass astern of the New York, although the vessels were not then navigating the waters of the United States, but waters of Canada, and notwithstanding by Sec. 4400 of the Revised Statutes the operation of the Inspectors' Rules is limited to vessels navigating waters of the United States.

Spencer on Collisions, Sec. 20.

If Inspectors' Rule 2 is not to be held to be in derogation of Sailing Rule 19, prescribed by Congress, and therefore void, can it, in view of Sec. 4400, be given extra-territorial effect?

The Circuit Court of Appeals held that there was not sufficient technical proof of the Canadian statute as a foreign law, but it is clear from the opinion that the statute was in fact before the Court, and our contention is that a court of *admiralty* will take judicial notice of foreign regulations for the prevention of collisions without such technical proof as might be required by a common law court in an ordinary action.

Talbot vs. Seeman. 1 Cranch, 1.

The Scotia, 14 Wall., 170-186.

Marsden on Collisions, 310-340.

Wharton on Conflict of Laws, Sec. 771.

Wharton on Evidence, Secs. 285, 331.

But if the rule is otherwise, then, in the absence of technical proof, the general maritime law will be presumed to exist in Canada, and under that law the *Cone-maugh* was not obliged to port and go astern of the *New York*, but might cross her bows at a proper distance ahead.

The Canadian statute which was before the Circuit Court of Appeals is printed in *Howell's Admiralty Practice* (Canada), p. 239, where the author states in a footnote:

"The imperial regulations upon which these are founded, and which came into force 1st September, 1884 (Order in Council, 9 P. D., 248), apply to British, and by international assent, to French, Italian, Greek, Portuguese, Norwegian, Swedish, Brazilian, Turkish, Chilean and Danish ships and boats (Marsden's Law of Collisions at Sea, 3d. Ed., 358). The United States have adopted regulations very nearly corresponding."

In the report of the Commissioner of Navigation for 1885, at p. 136, the Commissioner says:

"This code, which is now accepted as an integral part of the law of the sea, embodying the 'rule of the road,' in so far as navigation outside of the territorial waters of this country is concerned, was formally adopted by the United States Congress March 3, 1885. The attention of all persons concerned was immediately directed to the changes in the steering and sailing rules made by the act referred to, by a circular issued from this office under date of March 25 following (Treasury Department No. 40), which contained the new act printed side by side with the old law. The text of the Revised Regulations, which, although observed by all vessels on the ocean, is now given the sanction of law in the navigation of public and private vessels of the United States upon the high seas, and in all coast waters of the United States except harbors, lakes and inland waters, is subjoined."

In Gould & Tuckers' Notes, Ch. 5 (Navigation), p. 785, speaking of the rules fixed by Sec. 4233, R. S., it is said:

"These rules were adopted by more than thirty
"of the principal states of the world, and were at
"once regarded as entitled to judicial notice. The
"Scotia, 14 Wall., 170; 3 Blatch., 308; The Sylves-
"ter Hale, 6 Ben., 523. The Revised Code was
"adopted by Great Britain in 1884, and this and the
"regulations of 1863 are set out in parallel columns
"in Marsden's Law of Collision (2d. ed.), 471-485.
"This Revised Code has been adopted by the lead-
"ing nations, and is the act of March 3, 1885, ch.
"354 (23 St., 438)."

II.

Do the International Rules prescribed by the Act of 1885 apply to the lakes and their connecting waters?

By that act Congress provides:

"That the following revised international rules and regulations for preventing collision at sea shall be followed in the navigation of all public and private vessels of the United States upon the high seas and all coast waters of the United States, except as are otherwise provided for, namely:—"

Then follow twenty-seven rules for navigation.

Section 2 provides:

"That all laws and parts of laws inconsistent with the foregoing revised international rules and regulations for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States are hereby repealed, except as to the navigation of such vessels within the harbors, *lakes and inland waters* of the United States."

The Court of Appeals holds that the Great Lakes are to be regarded as "lakes and inland waters," and so within the exception to the repealing clause of the Act of 1885, and therefore that Section 4233, Revised Statutes, furnishes the navigation rules applicable to this case. .

The North Star, 62 Fed., 73.

The question is whether the Great Lakes are to be considered as "*lakes and inland waters*," or are they *coast waters*, or high seas within the meaning of the Act of 1885.

The construction given by the Court of Appeals to the words "lakes and inland waters" is inconsistent with the construction placed by this Court in *Moore vs. Transportation Co.*, 24 How., 1, upon almost the identical words in the "limited liability act," Revised Statutes, 4289. It is also inconsistent with the decisions of other courts construing these words.

American Transportation Co. vs. Moore, 5 Mich., 368.

The Garden City, 26 Fed., 793.

In each of these cases it was held that the words "lakes and inland waters" do not include the Great Lakes.

In the Seventh Circuit, which includes among other important ports Chicago and Milwaukee, it was held by the District Court, in direct conflict with the decision in the *North Star* in the Sixth Circuit, that the law of 1885 did apply to the lakes.

The Robert Holland and Parana, 59 Fed., 200.

The decision on this point seems to have been so well received that, though the case was appealed, it was affirmed without discussion as to this point. See the same case reported as

Bigelow vs. Nickerson, 70 Fed., 113.

In the case already cited, *Moore vs. American Transp. Co.*, 24 How., 1-37, the magnitude of lake commerce at that time (1851) is described. In a report presented to the House of Representatives by the Secretary of the Treasury (55th Cong., 2d Session, Document No. 277) it is shown that the tonnage of the lakes has trebled; that is to say, it has increased from 450,000 in 1868 to 1,350,000 in 1897. In transmitting the document, the secretary says:

"Compared with the shipping tonnage employed in the foreign commerce of the United States, the activity of the lake shipping is far greater. The bulk of transactions in the lake-carrying interests is so large as to rank it among the great conveyers of the world."

This Court has already referred to the Great Lakes in this language:

"These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other."

The Genesee Chief, 12 How., 443-453.

In *Ill. C. R. R. vs. Illinois*, 146 U. S., 387-435, the Court said:

"These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas."

And again (437):

"That the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that lands are held by the same right in the one

"case as in the other, and subject to the same trusts
"and limitations."

Speaking as to the term "high seas," as used in Sec. 5346, R. S., the Court said, 150 U. S., 261:

"The more reasonable inference is that Congress
"intended to include the open, uninclosed waters
"of the lakes under the designation of high seas.
"The term, in the eye of reason, is applicable to
"the open, unenclosed portion of all large bodies of
"navigable waters, whose extent cannot be meas-
"ured by one's vision, and the navigation of which
"is free to all nations and people on their borders,
"by whatever names those bodies may be locally
"designated. In some countries small lakes are
"called seas, as in the case of the Sea of Galilee in
"Palestine. In other countries large bodies of
"water, greater than many bodies denominated
"seas, are called lakes, gulfs, or basins. *The nomen-
"clature, however, does not change the real char-
"acter of either*, nor should it affect our construc-
"tion of terms properly applicable to the waters of
"either. By giving to the term 'high seas' the con-
"struction indicated, there is consistency and sense
"in the whole statute, but there is neither if it be
"disregarded. If the term applies to the open, un-
"enclosed waters of the lakes, the application of the
"legislation to the case under indictment cannot
"be questioned, for the Detroit River is a water
"connecting such high seas, and all that portion
"which is north of the boundary line between the
"United States and Canada is without the juris-
"diction of any State of the Union."

Then on page 263:

"There are vessels of every description on those
"inland seas now carrying on a commerce greater
"than the commerce on any other inland seas of the
"world."

And on page 266:

"It is true that lakes, properly so called, that is,
"bodies of water whose dimensions are capable of

"measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. *And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.*"

These are waters reached from the ocean; and by treaty the artificial canals used to avoid natural obstructions are open to the use of our own people and the people of Canada.

III.

Has the Circuit Court of Appeals in this case properly construed Inspectors' Rule No. 2?

As already stated, that Court held that under this rule, it was the duty of the Conemaugh to port and go under the stern of the New York.

The rule is as follows:

"When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

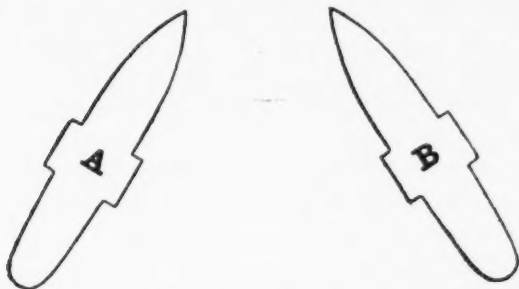
The following is a diagram of the fourth situation referred to, and which is furnished by the inspectors to illustrate the rule.

The Court of Appeals holds that this rule applies to all steamers meeting on crossing courses so as to involve the risk of collision, but the rule itself refers to steamers ap-

proaching each other in an *oblique* direction as shown in the diagram.

"FOURTH SITUATION.

"This is a situation requiring great caution; the red light of B in view to A, and the green light of A in view to B, will inform both that they are approaching each other in an oblique direction. A should put his helm to port, and pass astern of B, while B should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam-whistle, as required by the rules when passing to the right."



The New York and Conemaugh were not approaching each other as indicated in the diagram; they were on crossing courses, the Conemaugh coming *down* the river and the New York going *up* the river.

Rule 19, prescribed by Congress, Revised Statutes, Sec. 4233, declares:

"If two vessels are crossing each other so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Rule 23 declares that:

"Where one of two vessels shall keep out of the way the other shall keep her course, subject to the qualifications of Rule 24."

The New York and Conemaugh were on crossing courses so as to involve risk of collision, and if Inspectors' Rule No. 2 was intended to apply to such a case, does it not conflict with Rule 19, in that it provides that "B" (the New York) may port her helm? Is the duty to port under such circumstances consistent with the duty of the New York to keep her course as enjoined by the Act of Congress.

IV.

As to the duty of the New York to answer the Conemaugh's signals.

The Circuit Court of Appeals held that she was not obliged to answer, although Inspectors' Rules 1 and 2 expressly make it the duty of a steamer meeting another to indicate the course she intends to take by a proper signal, and they also require the other steamer to answer such signal promptly. These rules are set out in full in our petition, and need not be quoted here.

If these rules are applicable they have the force of law.

They contain no exception. Can the Court excuse a steamer for not answering because she has the right of way and thus make an exception not provided for in the rules? The importance of the rules requiring signals to be answered has been recognized by the Treasury Department, as will appear by the following circular:

CIRCULAR.

CAUTIONARY NOTICES TO PILOTS OF STEAM-VESSELS REGARDING THE USE OF SIGNAL-WHISTLES.
TREASURY DEPARTMENT.

1890.

Department No. 10.

Office of the Supervising Inspector-General of Steam Vessels,

Washington, D. C., February 25, 1890.

The attention of pilots of steam vessels is called to the frequent collisions occurring through failure to observe the pilot rules laid down by the Board of Supervising Inspectors, whereas if such rules were strictly observed collisions would be almost absolutely impossible.

The main causes of collisions result from the failure of pilots to consider Rules I. to VII., inclusive, in strict connection with Rule III., of the Pilot Rules for Lakes and Seaboard, which rule reads as follows:

"Rule III. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The rule quoted qualifies all the others, and is the only qualification that can be permitted with safety when steamers are meeting in such positions as to render collisions possible. There is no authority in the rules and regulations for vessels approaching each other from opposite directions, for what has become technically known among pilots as "cross signals"—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, when a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to com-

ply with, instead of answering it with a cross-signal, as is now so much the custom to do, it is his imperative duty to at once observe the provisions of Rule III., namely, give the alarm-signal whistle and at once slow his engine and reduce speed to bare steerage-way; and the opposing vessel, immediately on hearing the alarm-signal whistle, should also slow down, and stop if necessary, till the danger of collision is passed.

In investigating collision cases, inspectors of steam vessels would be justified in considering any pilot who gives a cross signal instead of complying with Rule III. *prima facie* guilty of neglect of duty. So, also, of the pilot giving the first signal, who fails to slow or stop his boat immediately after he discovers his signal whistles are answered otherwise than as given by himself.

Rule II. of the Pilot Rules for Western Rivers has the same application to those rules that Rule III. of the Pilot Rules for Lakes and Seaboard has to the latter rules, and it must be observed in the same manner. It is desirable that all pilots should thoroughly understand that when whistles are blown as passing signals, it is a rule, never to be deviated from, that one whistle means that the vessel giving such signal is or intends porting her helm; two whistles, that the vessel giving it is or intends putting her helm to starboard.

Local inspectors of steam vessels will make requisition on the department for a sufficient number of this circular to supply each pilot of steam vessels in their respective districts.

JAS. A. DUMONT,
Supervising Inspector-General.

Approved:

WILLIAM WINDOM,
Secretary.

In view of the express language of the rules and of the action of the Treasury Department, can the Court properly excuse a steamer from fault in not answering signals simply because she has the right of way?

If the Canadian rules or our own under the law of 1885 apply, then the circumstance that the New York did not

answer our signals is immaterial. Either law makes the use of signals optional with each steamer, and the holding of the Circuit Court of Appeals that the silence of the New York denoted dissent on her part, is clearly erroneous.

The argument is that the use of signals being optional, under the Canadian law, and the law of 1885, while it was entirely proper and to be expected that the Conemaugh, charged with an active duty, would indicate to the New York the manner in which she proposed to discharge that duty, yet the use of signals being optional, an assenting signal from the New York, which would impose no fresh obligation upon either, would mean neither more nor less than her silence; assuming that she heard our signals which the master of the Conemaugh had the undoubted right to assume were heard.

On the other hand, the law, under R. S., Sec. 4233, provides for no signals whatever, and no fault could arise and no presumption be based upon the use or non-use of signals under that law. If, therefore, anything is to be argued from the use or non-use of signals, it must be under the rules of the Supervising Inspectors, and while one of those rules requires that we should signal our intention, another rule (No. 3) as positively requires the New York to answer with an assenting signal, or, if she was in doubt as to our course, or disapproved of it as dangerous, at once to give a succession of short blasts as a danger signal, and *immediately to reduce her speed to bare steerage-way* and reverse if necessary.

There is difficulty in understanding how the Conemaugh can be held under the Inspectors' rules, and so glaring an infraction of the same rules on the part of the New York overlooked, when that steamer simply explains that she broke the rules because, failing to keep any watch, she

was ignorant of the Conemaugh's presence and of her signals.

V.

As to the duty of the New York to maintain a sufficient lookout.

This has already been referred to in our brief; the importance of the question must be evident. Is the vessel to be excused from obtaining a lookout because she has the right of way?

VI.

As to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel.

The Circuit Court of Appeals excused the New York for changing her course because of the intervention or presence of the barges which were moving across her course towards the American shore. These barges were not fixed obstructions like a rock, or bank or shoal. They were vessels under way, moving on a course or in a direction known to the New York. They were in tow of the Burlington, and their speed independent of the current was at least two or three miles an hour. They would have moved out of the way and left the New York a clear and unobstructed passage on her course if the latter had but checked her speed for a few moments. Was it not her duty to do so, especially in view of the presence of the Conemaugh, and the signals which she had sounded. Had

the New York the right to navigate in disregard of the presence of the Conemaugh? Did the Court of Appeals err in holding that "her proper course could not be affected by the fact of the Conemaugh's presence?"

We respectfully submit that these questions are of such vital importance as to justify us in this application for a writ of certiorari.

VII.

As to the duty of the New York in this case to check her speed or stop.

The law on this question, as laid down by this Court in *The Delaware*, 161 U. S., 459, seems to be that it will not be a fault for the preferred vessel to maintain her course and speed "in the absence of some distinct indication that the other is about to fail in her duty."

And the important point arises as to what shall be held to be such an indication; and whether in this case such an indication existed as ought to have shown to the master of the New York the necessity of checking or stopping in order to avoid the danger of collision.

Now the conceded facts are:

1. That the steamers were approaching on crossing courses so as to involve risk of collision.
2. That they were each showing to the other a single colored light; that is to say, the Conemaugh was showing to the New York a green light, and the New York was showing to the Conemaugh her red light. The New York at no time saw nor could see the Conemaugh's red light.

3. The Conemaugh indicated by her signals of two blasts of her whistle, which were repeated three times, and which the men on the New York ought to have heard, and which they would have heard if they had maintained a proper lookout, that the Conemaugh intended to cross the bows of the New York.

Was not the exhibition of the Conemaugh's green light and its continued bearing on the New York's port bow, together with her signals of two blasts which were repeated three times, with nothing to prevent them from being heard, a sufficient indication that the Conemaugh was not going to keep out of the way except by crossing ahead of the New York?

This is a question of importance to the navigators of the lakes, to which the authoritative answer of this Court is requested. May a steamer which has the right of way under Rule 19 keep her course with unabated speed when she sees only the green light of the other full upon her port bow, and heard from the other signals of two blasts of the whistle, declaring that the other intends to cross the bows of the privileged steamer? May she maintain her speed when the other steamer, in the language of the Circuit Court of Appeals in this case, "is either in or dangerously near the course of the" privileged vessel, and is "not keeping out of her way?"

There is a conflict between the opinion of the Court of Appeals for the Sixth Circuit, in this case, and that of the Court of Appeals for the Second Circuit, in *The George S. Shultz*, 84 Fed., 508, affirming the decision of Judge Brown in 74 Fed., 574.

The Court of Appeals in this case, speaking of the duty of the New York to resume her course after passing the

Burlington's tow, to which reference will be made later in this brief, says:

"It is clear that the course of the New York "would not naturally be confined to swinging on "her starboard wheel through the passage not much "wider than her length. That would not have been "the easy sweep which she was entitled to make in "turning back towards mid-channel. The Cone- "maugh, therefore, being where she was, was either "in, or dangerously near the course of the New "York, and was not keeping out of her way. More "than this, she increased her fault by throwing "herself right across the bows of the New York." (82 Fed., 825.)

The question, therefore, presents itself, whether the privileged steamer, under Rule 19, is to be held free from fault if she continues on without checking or stopping when the other steamer "is either in or dangerously near" her "course and [is] not keeping out of the way."

Whatever may have been the fault of the obligated steamer in placing herself in or dangerously near the course of the preferred steamer, and in not keeping out of the way, does the law permit the preferred steamer to maintain her speed unabated, and rush into collision without stopping or checking, and without sounding a signal of warning? This question is sharply presented in this case. It involves the safety of property and the lives of passengers, the transportation of which go to make up the vast commerce of the lakes. We submit that it is of sufficient importance for this Court to consider, and therefore justifies the application for the writ of certiorari in this case.

The Circuit Court of Appeals justified the New York for not stopping or checking under the decisions of this Court in

The *Britannia*, 153 U. S., 130, and the *Delaware*,
161 U. S., 450.

And it is a matter of general importance to all who are interested in navigation upon the Great Lakes as seamen or owners, to know from this Court—the supreme authority—whether the rule laid down in those cases was intended to justify a steamer navigating so great a thoroughfare of commerce as the Detroit River, thronged with vessels of all kinds by day and by night, if she has no lookout, if the persons navigating her pay so little attention to an approaching steamer, in a clear night, that they neither see her lights nor hear her signals, although such lights are properly placed and burning brightly, and although such signals are of such a character as to answer the requirements of the law in every respect.

We believe, and therefore submit, that the cases cited do not justify such a conclusion. The distinction between the controlling facts in each of those cases, and those involved in the one at bar, seems to be so clear as to destroy all analogy between them and this case. As the Court is entirely familiar with those cases, it is unnecessary for us to dwell upon them, except to remark that in neither of them did the obligated steamer indicate by her lights and signals that she intended to cross the bows of the preferred vessel. In neither of those cases did it appear, as the Circuit Court of Appeals finds in this case was true of the *Conemaugh*, that the obligated vessel was either in or dangerously near the course of the preferred vessel, and was not keeping out of the way, and in neither of those cases was there an absence of a lookout.

It is true that the Court of Appeals, in excusing the *New York* for want of a lookout, and for her failure to see the *Conemaugh*, says in its opinion that "if she had seen her she would have seen her swinging slowly to the port of the *New York* in the wake of the barges in the tow," etc. But waiving the manifest inconsistency of this

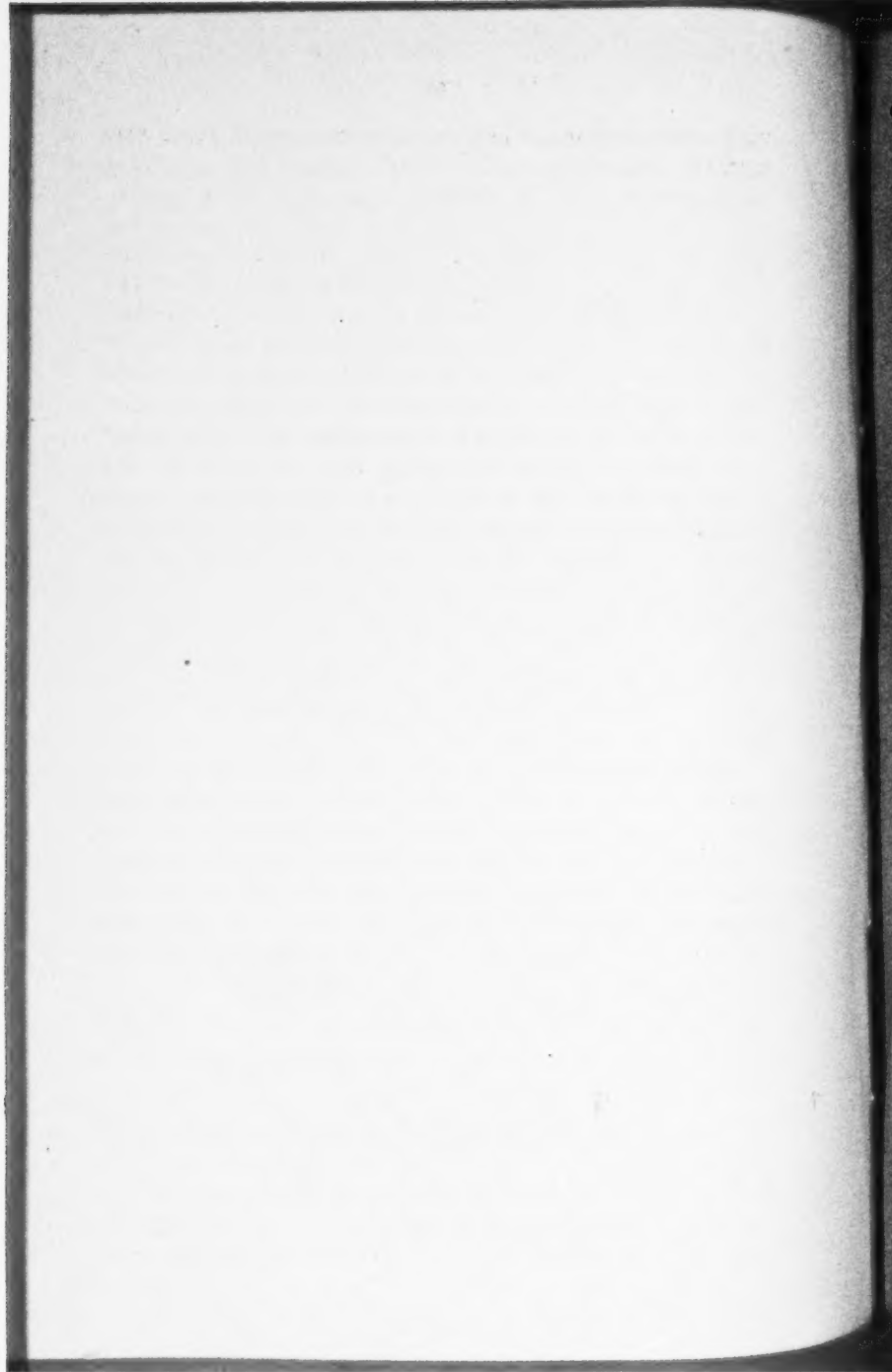
with other findings, a lookout or proper watch must also have been seen, according to the Court's express findings, "that the steamers were on crossing courses so as to involve risk of collision, and that the New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, each showing to the other but one light." We have also the finding by the Court that it was the duty of the New York, after passing the stern vessel in the tow, "to resume her general course up stream near mid-channel," which she could only do by starboarding. And if the Conemaugh was bearing to the port of the New York in any such sense as that she might clear, starboarding by the latter would manifestly produce danger of collision. This suggestion of what a lookout might have seen is not of a character and surely was not intended to modify the finding that the vessels were on crossing courses so as to involve risk of collision, which the Court of Appeals distinctly finds to have been the fact, and which is, indeed, the sole basis of the case as against the Conemaugh.

As will be seen, the questions involved in this case are, to a degree at least, independent of each other. But they are all of general importance to the commerce of the lakes; and in view of this fact, and of the apparent conflict of opinion which exists between the Circuit Court of Appeals for the Sixth Circuit, by which this case was decided, on the one hand, and the decisions in the Seventh Circuit, and also in the Second Circuit, on the other, we respectfully submit that the writ should issue in this cause.

H. D. GOULDER,
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Petitioners.

F. H. & G. L. CANFIELD,
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Petitioners.



1st Dep. 56.

FILED
MAR 30 1899
JAMES H. MCKENNEY,
Clerk.

Brief of Goulder for Petitioners.

No. 277.

Filed Mar. 30, 1899.
Supreme Court of the United States.

THE ERIE & WESTERN TRANSPORTATION COMPANY, et al.,
PETITIONERS,

vs.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE
PROPELLER "NEW YORK."

BRIEF FOR PETITIONERS.

HARVEY D. GOULDER,
JOHN C. SHAW,

Proctors for Petitioner, The Erie
& Western Transportation Co.

INDEX.

	PAGE.
Statement	1
History of the case	5
Libel	5
Answer	8
Proceedings in District Court	10
Proceedings in United States Circuit Court of Appeals	11
Points of Error	15
Division of Argument	17
First, Question of lookout, proper course of New York and starboard hand rule	18
Second, Available channel between rear barges of tow and Canadian shore	25
Third, Position and relation of vessels at blowing of first, second and third signals by Conemaugh, and movements of vessels from the third signal to time of collision, and law applicable, covering Points VI, VII, VIII and IX	30
I. Position of the vessels at the time the Conemaugh blew her first signal of two whistles to the New York, and the respective duties and obligations at that time	30
Whether the Great Lakes and their connecting waters are " lakes and inland waters of the United States " within the exception of the Act of 1885, 23 St. L., 438	32
Rules of 1864, R. S., Sec. 4233, applied by Circuit Court of Appeals	35
II. Position of the vessels at the time the Conemaugh blew her second signal of two blasts to the New York and the obligations at that time	42
The question of the extra-territorial application of the Supervising Inspectors' Rules	48
Canadian law	50
Whether technical proof of Canadian law necessary	52
Seventh situation of Supervising Inspectors	54
III. Position of the vessels at the time the Conemaugh blew her third signal of two blasts	60
Argument	64
IV. The movements of the vessels from the third signal to collision	66
Argument	101

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE ERIE & WESTERN TRANSPORTA-
TION COMPANY, et al.,

Petitioners,

vs.

THE PROPELLER "NEW YORK," THE
UNION STEAMBOAT COMPANY,

Claimant.

No. 277.

DISTRICT JUDGE'S OPINION, 53 FED., 553; ON REHEARING,
REC. 196.

CIRCUIT COURT OF APPEALS, 82 FED., 821, REC. 275.

STATEMENT.

About 8 o'clock p. m., Oct. 21, 1891, petitioner's steamer, the Conemaugh, down bound, laden with about 1,800 tons of package freight, being a steamer 250 feet long, 35 feet beam, came into collision with the propeller New York, up-bound, laden with a cargo of general merchandise, being a steamer 270 feet in length, 37 feet beam. The collision occurred on the Canadian side of the Detroit river a short distance below the town of Sandwich. The Conemaugh was struck on her starboard side forward, and almost immediately thereafter beached on the Canadian channel bank. The damage to the Conemaugh and cargo, as fixed

by the decree in the District Court, was \$69,978.91; the New York's damage, as stated in the cross-libel, was about \$3,000.

The circumstances of collision were as follows:

The Conemaugh, with all the signal lights required by law, properly placed and burning brightly, and a full complement of officers and crew properly stationed and attentive to their duties, including two men at the wheel, was proceeding down on a course somewhat to the American side of mid-channel. At a point about three-quarters of a mile above Smith's coal dock, on the American side, her watch discovered the propeller Burlington, with a tow of four lumber barges, which from a course down the river on the Canadian side of mid-channel was rounding to for the purpose of coming up to Smith's dock. The length of the tow was about 2826 feet; the channel at that point was 3000 to 3300 feet wide. When around so as to exhibit to the Conemaugh her own green and white lights and the green light of her first barge, the Burlington blew a signal of two blasts, indicating to the Conemaugh that she should pass down between the tow and the Canadian shore. The Conemaugh answered with two blasts, checked her engine from 70 to 40 revolutions, and hard starboarded in accordance with the signals exchanged. The master of the Conemaugh, with the aid of his glass, seeing sufficient room to pass between the tow and the Canadian shore, adopted a diagonal course down and across the river, and while on that course the lights of the propeller New York were seen coming up the river a considerable distance below the tow; thereupon the Conemaugh blew to her a signal of two blasts, indicating

her purpose to continue her course and pass down on the Canadian side. The Conemaugh was then in Canadian waters, and the New York, apparently, about mid-channel. Receiving no answer, the Conemaugh repeated her signal, but without reply. The vessels were then perhaps three-quarters of a mile apart. The clear space of navigable water between the tow and the Canadian shore was 800 to 1000 feet, as found by the District Judge; not less than 500 feet, as found by the Circuit Court of Appeals, which adopted the lowest estimate; but in either view, sufficient for the navigation of the two steamers.

In this situation the Conemaugh again blew a signal of two blasts. Dispute exists as to her distance astern of the tow, the shortest distance suggested by the testimony being 300 feet; clear evidence, in our opinion, fixing it at from 700 to 1000 feet. Both vessels were now in Canadian waters, and the Conemaugh was crossing the course of the New York at a safe distance ahead. To this third signal of two blasts there was no answer.

Shortly after this third two blast signal and doubtless for the purpose of avoiding the rear barges of the tow but without signal of any character to the Conemaugh, the New York sharply altered her course by porting; the Conemaugh blew an alarm signal, and, as the only chance of possible escape, put her helm hard a-starboard and gave a strong signal to the engine. The New York, which was then abreast of a point between the last two barges of the tow and not over a quarter of a mile from the Conemaugh, stood on with undiminished speed and having started to swing back on starboard helm, she failed to clear by that manœuvre, and not

abating her speed she struck the Conemaugh near the forward gangway and the latter sank within a length (250 ft.) of the Canadian bank.

The evening was clear and starlight; there was nothing to prevent the New York from seeing the Conemaugh's lights or hearing her signals if a proper watch were kept.

The New York did not at any time signal the Conemaugh, nor did she stop or check her speed before the collision. On behalf of the New York, no witnesses were called although her officers and crew were in court, but her answer asserted an entire failure to see the lights of the Conemaugh and to regard or hear her signals. The language of the answer is :

"When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel;" (9)

also, that while passing under the stern of the last barge, having starboarded her helm, she heard several short blasts from the Conemaugh close at hand, not more than 100 feet away, but

"collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard a-starboard helm." (10.)

Before she rounded to and signaled the Conemaugh, the Burlington had exchanged signals of one blast with the New York, then a mile and a half or more below the Burlington, coming up somewhat on the American side of mid-

channel. The New York and the Conemaugh were then more than three miles apart and these signals were not heard nor the presence of the New York discovered by the Conemaugh, although a proper watch was kept, until after the Conemaugh had starboarded and was in the performance of her agreement with the Burlington, as before stated.

HISTORY OF THE CASE.

Nov. 11, 1891, libel was filed in the District Court for the Eastern District of Michigan by the Erie & Western Transportation Company, as owner of the Conemaugh and as trustee for persons interested in the cargo, and subsequently the insurance companies intervened for their interest as underwriters on cargo.

The libel alleges,

Third. * * * Between 7 and 8 o'clock p. m., of said day (Oct. 21, 1891), the weather then being clear and fine, the Conemaugh was proceeding down the Detroit river to the American side of mid-channel, having hauled some to starboard to avoid some piles driven in the channel, and when a half or three-quarters of a mile above the said coal dock (Smith's dock), she received a signal of two blasts from a steamer which, with four barges in tow, had, theretofore being going down the Canadian side of the river and was then rounding in and up to and was near the said coal dock, exhibiting her masthead and green lights to the Conemaugh.

The Conemaugh's engine was at once checked and remained checked until after the time of collision hereinafter stated, her helm starboarded, and she answered with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was "rounding to" and which then stretched out in the river towards the Canadian side.

The Conemaugh then made the lights of a steamer, which proved to be the said propeller New York, then down the river below the said tow and coming up so heading towards the Conemaugh, and on such a course that the Conemaugh, as she was proceeding, would cross the New York's course before the New York could reach the point of intersection of the two courses.

The Conemaugh at once blew to her a signal of two loud and distinct blasts of her whistle, thus notifying the New York that the Conemaugh was so directing her course as to go well in on the Canadian shore and to leave the tow and the New York to starboard as she should come abreast of them respectively.

Not receiving a reply thereto, the Conemaugh promptly repeated the signal of two blasts. To this second signal the New York did not reply, and again the Conemaugh blew a two-blast signal; when the New York which had all the time been coming rapidly up the river, still without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over toward the Canadian shore; whereupon the Conemaugh blew alarm whistles and hard starboarded her helm.

Notwithstanding there was ample room, had the New York properly approached, and had she been properly handled, for the Conemaugh and the New York to have safely passed each other and the tow in accordance with the signals of the Conemaugh, the New York, first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on full speed and with her stem struck the Conemaugh with tremendous force on the starboard side, abreast the Texas, and almost immediately the Conemaugh struck the Canadian bank of the river, and filled and sank, the New York having cut deeply into her and crushed her side. That the signals of the Conemaugh, above mentioned, were of the proper and usual character, given by loud and distinct blasts of a good and sufficient steam whistle, but the New York throughout disregarded every one of said signals and ran over into and collided, at full speed, with the Conemaugh, without answering or heeding or herself giving any signals whatever.

That before and at the time of said collision, it was a

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quiet, calm and clear evening, lights could be seen a long distance away, and steam whistles could be heard at a great distance.

The libel thereupon charged specific faults against the New York, as follows :

1. In not keeping a proper and sufficient lookout.
2. In being in charge of incompetent, reckless and negligent officers.
3. In adopting and pursuing the course she did until close to the point where she would meet the Conemaugh and then in departing violently to starboard from said course.
4. In changing her course a second time and turning and swinging over and into and against the Conemaugh.
5. In not passing clear on the starboard side of the Conemaugh, or checking, stopping and reversing her engines before her actions made the same necessary.
6. In that, being the ascending vessel, she maintained her course, and in not checking her speed or stopping if, for any reason, she found it necessary or advisable not to proceed on the course she had previously adopted.
7. In not answering the Conemaugh's signals and in not giving the Conemaugh any signal whatsoever.
8. In disregarding the signals she had received from the Conemaugh. (2-3.)

Diagram No. 1 illustrates the averment of the libel.

The New York's answer averred (9):

Fourth. * * * The propeller New York was bound up said river, and when nearing the point in said river below where the River Rouge empties into the Detroit river, a steamer, with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern. While passing under the stern of this barge, and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand, and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed

around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank, and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge, she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a manoeuvre was attempted, a collision could best be avoided by swinging clear under a hard-a-starboard helm.

Diagram No. 2 represents the averments of the answer and cross-libel.

PROCEEDINGS IN THE DISTRICT COURT.

Libellant's witnesses, including the officers and crew of the Conemaugh, and a number of officers and men from the Burlington and her tow, and persons on shore, were examined in open court, and it was held that the collision occurred 900 or 1,000 feet from and a little on the port quarter of the stern barge of the tow, which barge was held to have been 800 or 900 feet from the Canadian shore, headed somewhat toward the American side of the river. The District Court held that a temporary departure of the New York from her course was necessary and justified by the presence of the tow, still there was ample room for her to starboard and resume her course, after passing the tow, which would have taken her astern of the Conemaugh; that this was a plain duty on her part which the master of the Conemaugh had a right to expect her to perform, his vessel having already "crossed the lawful path of the New York;" that the proofs established that the New York maintained double the speed of four miles stated in her answer until the vessels came together, and that she was grossly in fault and negligent in failing to see the lights and hear the signals of the Conemaugh; or seeing and hearing, guilty of even worse fault in disregarding them. It held that the faults of the New York were so many and flagrant that "it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation."

Having found that the Conemaugh had in fact crossed the lawful course of the New York and was free from fault until the danger signal was blown, the court condemned the Conemaugh for failure to reverse; but on petition for re-

hearing, in view of the fact that collision was then inevitable and so expressly admitted in the answer, and in view of the then recent utterance of this court in the City of New York, 147 U. S. 85, the court modified its decree and exonerated the Conemaugh.

IN THE CIRCUIT COURT OF APPEALS.

The case was duly appealed by the owner of the New York, to the Circuit Court of Appeals, and that court, modifying only slightly the facts as found by the District Court and addressing its consideration to the three faults against the New York:

1st. In failing to keep a proper lookout and answer signals;

2d. In failing to keep her course; and

3d. In not stopping and reversing when there was danger of collision,

reversed the decree of the District Court, held the New York to be free from fault, dismissed the libel and ordered a personal decree against the Erie & Western Transportation Company, for the damages to the New York. Afterwards petition for rehearing was denied.

The Circuit Court of Appeals held that the Great Lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the International Regulations for prevention of collisions at sea, which had been adopted by the United States in 1885, (23 St. at Lg. 438), and in substantially the same form by the leading maritime nations, and which governed in Canadian waters.

The court held that it could not regard the Canadian Regulations without technical proof of the law, and applied to these vessels in Canadian waters not only the sailing rules found in section 4,233 of the Revised Statutes but Supervising Inspectors' Rule II, providing:

"When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth and fifth situations), they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Extending the Supervising Inspectors' rules to foreign waters, the court ignored the succeeding rule (3), and notwithstanding the provisions of that rule (quoted below), absence of lookout, ignorance of another steamer's presence in dangerous situation and relation, giving signals and displaying lights, the New York was excused on the ground that even had she seen lights and heard signals indicating a course and a purpose to cross her bow, the New York would still have the right to continue her speed in silence, ignoring the presence of the other steamer, her lights, her signals, her purposes, as fully as if she were not there.

Rule III provides :

"If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The Circuit Court of Appeals found :

"The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one (colored) light." (282)

"It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side." (278)

"The Conemaugh, therefore, being where she was, was either in or dangerously near, the course of the New York, and was not keeping out of her way. (281)

And although the steamers were on crossing courses, involving risk of collision, and the Conemaugh had signaled her intention to continue across the bows of the New York, and it was the duty of the New York to keep her course, the court held the New York justified in changing her course to starboard in the direction of the Conemaugh's course, because of the presence of the stern barges of the Burlington's tow, a temporary obstacle then moving toward the American shore out of the way of the New York, and which she might have avoided by checking or stopping and breasting the current. Upon this point the Court of Appeals in its opinion said :

"It is well settled * * that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence, and must allow for the effect. * * The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken had the Conemaugh not been in sight." (279)

The New York having changed her course on account

of said barges, was held not obliged immediately to resume her course after passing the last barge, the court saying :

"It is undoubtedly true that the New York's proper course after passing the tow, was to resume her general course up stream near midchannel. All the witnesses who observed her course, admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port ; and the only question is, did she begin to do this as soon as she ought to have done it? * * She was not obliged to turn a sharp corner around the stern of the last barge in the tow. She certainly would not have done this had the Conemaugh not been there, and as we have seen, *her proper course could not be affected by the fact of the Conemaugh's presence.*" (280)

The available navigable channel between the tow and the Canadian bank as found by either court was sufficient for the safe navigation of the vessels (not less than 500 feet.) Each court held that it was the *lawful* course of the New York which the Conemaugh must regard and avoid. The district judge on this subject held that granting some alteration of course necessary and permissible to avoid the rear barges in the tow, such privilege could properly extend only so far as was reasonably necessary to avoid it, and having met the necessity, the New York must promptly resume her course.

The Circuit Court of Appeals hold practically that the New York owed no duty to the Conemaugh, and in departing from her course in a direction which tended to interfere with and thwart the Conemaugh's announced manœuvre for keeping out of the way, the New York might make the change as broad and resume her course as gradually, easily swinging back under slowly moving wheel, as if the Cone-

maugh was not on the scene, and, therefore the presence or absence of a lookout was immaterial, and that the burden on the Conemaugh was to keep out of such varying course of the New York, which on her part should be in no way circumscribed by the Conemaugh's presence or limited by any special circumstance.

POINTS OF ERROR.

I.

After the starboard hand rule has come into operation, with its burden and privilege respectively, is the privileged steamer so far privileged as to her course and speed that it is unnecessary for her, at night, to regard the lights and signals of the approaching steamer; and is she so far privileged that upon the intervention of a temporary floating obstacle, which she may avoid by checking and still hold her course as to the burdened vessel, that, though she chose to maintain her speed and alter her course in a manner and direction which must necessarily embarrass and may thwart the maneuver of the burdened steamer to clear, it is unnecessary for her to pay any heed to or give any notice to the burdened vessel of her intention?

II.

The decision of the Circuit Court of Appeals exonerates the New York, although she had no lookout or any competent watch, and was ignorant of the presence of a large steamer which had been displaying proper lights and blowing repeated signals until that steamer, with which she collides, was within a hundred feet and collision was inevitable, though the collision occurs while she is engaged in a conflicting change of course made, without notice, to avoid another moving vessel, after coming under the operation of a rule requiring her to hold her course, and without which change or with a smaller departure, which was possible, the collision would not have occurred.

III.

After the starboard hand rule has come into operation between two steamers, whether the intervention of another moving steamer is such a special circumstance as will permit the privileged steamer to alter her course, at night, without notice, in such manner as to conflict with the maneuver of the burdened steamer to clear, although it is clear that such privileged steamer may at the same time avoid the intervening vessel and hold her own course as to the burdened steamer by simply checking her speed?

IV.

Granting such right, should she make the least deviation necessary and come back as quickly as practicable, or may she make such deviation as if the vessel bound to keep out of her way were not in sight?

V.

Is the privileged vessel so far privileged that when the burdened vessel is "either in or dangerously near" the course of the privileged vessel, and is "not keeping out of her way," the privileged vessel need neither stop nor reverse, but having altered her course for a temporary moving obstacle, may turn back to midchannel gradually on an "easy sweep" regardless of the presence of the burdened vessel?

VI.

The statute requiring a steamer having another on her own starboard hand to keep out of the way, whether it is competent for the Supervising Inspectors to pass a supplementary rule requiring this to be done in a particular manner.

VII

The question of the extra-territorial force of the rules of the Supervising Inspectors, both vessels navigating in foreign waters.

VIII.

Whether the Great Lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the operation of the International Regulations for the prevention of collisions at sea, adopted by the United States in 1885 (23 St. L. 438).

IX.

The Circuit Court of Appeals held that it could not regard the Canadian sailing rules without technical proof of the Canadian law, and applied the rules found in Sec. 4233 R. S., and rule 2 of the Supervising Inspectors' rules, the latter requiring a steamer having another on her starboard hand to keep out of the way by porting. (Petition p. 9.)

An independent consideration of each point of error would necessarily involve a distinct analysis of the facts in reference to each. For convenience in presenting the case, and as more clearly showing the errors of which we complain and present, the argument will be divided:

- First:** The question of lookout and the holding of the court as to the proper course of the New York and their construction of the starboard hand rule.
- Second:** The channel between the Canadian shore and the rear barges of the tow available for the navigation of the vessels.
- Third:** Consideration of the positions and relation of the vessels at the blowing of the first, second and third passing signals of two blasts by the Conemaugh, and the movements of the vessels from the third signal to the time of the collision, presenting in connection with each consideration the law applicable to that situation, covering Points VI, VII, VIII and IX.

FIRST.

The question of lookout and the holding of the court as to the proper course of the New York and their construction of the starboard hand rule.

The duty of maintaining a proper and sufficient lookout has been so often stated, iterated and reiterated by the courts, is so plainly consonant with prudent seamanship, and failure to maintain so productive of disaster, that nothing but the clearest and most convincing showing that the result would or could not have been different if a proper lookout had been kept, is sufficient to exonerate a vessel failing in this duty. The obligation to maintain a competent lookout so stationed as to be afforded an unobstructed view of approaching vessels and the discovery of pending danger existed as a part of the common law of the sea before the enactment of sailing rules, and we believe is recognized by every maritime nation.

This obligation, however, as any other whether resting in express regulation, custom or prudent seamanship, is not arbitrary, although by reason of its importance it more nearly approaches arbitrariness than any other, and on the vessel remiss in this regard rests the burden of showing that the result would (or must) have been the same.

The New York was without competent lookout. Her answer admits an entire failure to note either the lights or signals of the Conemaugh. It states (9):

"When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the

New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge and when abreast of her quarter starboarded so as to go close under her stern. While passing under the stern of this barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York which was then swinging under a hard a-starboard helm. A collision was then inevitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard a-starboard helm."

An uncontraverted fact in the case is that these vessels were on crossing courses;

"It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision," (278); and,

"The Conemaugh, therefore, being where she was, was either in or dangerously near the course of the New York, and was not keeping out of her way," (281).

Both courts held that the New York's proper course after passing the tow was to resume her general course up stream near mid-channel.

The District Court held that she must deviate only so much as reasonably necessary and promptly resume her course, and so defining the lawful course of the New York, held that the Conemaugh was keeping out of the way and had crossed the proper course of the New York, in fulfillment of her statutory duty.

The Circuit Court of Appeals, speaking of the course, say:

"Her natural course would have been to swing gradually to port under a slowly turning starboard wheel, so as to make an easy sweep back to mid-channel" (280), and

"The proper course of the New York was that which the Conemaugh ought to have known *she would naturally have taken had the Conemaugh not been in sight.*" (279).

But even as to such a course, the Circuit Court of Appeals distinctly holds that the Conemaugh was either in or dangerously near it.

Taking up this question as the Circuit Court of Appeals presents it, the Burlington tow, in reference to which each of these vessels was navigating under proper passing signals, is treated as a fixed obstruction, and by mechanically applying the starboard hand rule and a misconception of the doctrine of the Delaware (161 U. S., 469), and the J. C. Hasbrouck (93 U.S., 405), the *privilege* of the favored vessel is converted into *license* as to course and speed without knowledge of the attending circumstances; license, which, by reason of a necessary departure from her course is so broadened as to authorize her to navigate free from obligation of any character which would not rest upon her, were she the only vessel afloat. This is the direct and positive declaration of the Circuit Court of Appeals; it is the logical result of the exoneration of the New York, in her failure to know the real situation, a fault, in this case, which can be condoned on no ground which does not lead to as illogical result.

Each of these vessels and the Burlington tow had a right to navigate the river; each owed some duty to the

other; the failure of one to meet that duty furnishes no justification for failure on the part of the other not placed *in extremis*. The privilege to the favored vessel is designed to prevent and not to promote collision, and a construction of the starboard hand rule which allows the favored vessel to wantonly continue her course and speed until they are *in extremis*, puts a premium on stubborn, stolid negligence or willful disregard of surrounding circumstances and compels the burdened vessel to navigate absolutely at her own risk, if at all.

Certainty in the obligation and privilege under the starboard hand rule is essential and doubt would be productive of disaster, but the privilege and the obligation each have their limitation. It has been clearly declared by this court:

"The preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

The Delaware, 161, U. S., p. 469.

A competent lookout and watch on the New York would have known that there was a down-bound steamer above to which the Burlington had blown a passing signal of two blasts, since the New York was nearer to the Burlington when the latter blew to the Conemaugh than when the Burlington exchanged the single blast passing signals with the New York. They would have known that that passing signal related to the tow as a vessel under steam, and that whatever vessel the Burlington was blowing to must also pass between the last barge in tow and the Canadian shore. They would have known that the down-bound steamer intended to pass and not to stop in the bight of the tow,

since in that purpose no signal would be necessary or given, as a single blast signal would not have been necessary or given if they had purposed remaining below until the tow straightened up in rounding to. They would have known that if the situation of the tow made it necessary at that time for either the down-bound steamer or their vessel to await the manoeuvre of rounding to, they, (especially if navigating in ignorance of the starboard hand relation), must have known that the duty of waiting lay with the ascending steamer. They would have known that the descending steamer was on a crossing course as indicated by her lights, by the Burlington's signal, by the Cone-maugh's signals and by the fact that the only available channel lay between the tow and the Canadian shore. They would have known that the descending steamer must navigate in relation to their own vessel; that the two blast passing signals were blown to her and that they indicated a purpose to pass on her starboard hand, between her and the Canadian shore; if, as averred in their answer, that could not be done with safety, they knew by the repetition of the two blasts that the descending steamer did not observe any such difficulty. They would have known that as to their own vessel the other was burdened with the obligation of keep-out of her way, and if such difficulty existed would not be able to do it as her signals indicated she would try; that the descending steamer, under the burden of the starboard hand rule as to her, was not passing her to port, could not pass her to port and did not mean to try it. They would have known that the descending steamer was either on the course that the material surroundings made necessary and her

signals indicated or that these did not correlate with her position and heading, making the situation one of doubt.

What did she know? Nothing, as she claims, until collision was inevitable, but she is to be charged with knowledge of all the facts which a competent lookout should have known. What did she do? She maintained a speed double what she avers, and in perfect silence altered her course and so brought the Conemaugh, which had already crossed her proper course a safe distance away, again ahead and into collision, and so produced even the risk of collision.

But it is said that the New York was holding her course; that that was her proper and lawful course and the one the Conemaugh must be held to have known she would take and allow for. Such statement of the privilege furnishes a clear illustration of the necessity of giving a construction to the sailing rules that will further their purpose to prevent disaster and not invite it. If her proper course were that which she would naturally take "had the Conemaugh not been in sight;" if "her proper course could not be affected by the fact of the Conemaugh's presence;" if to avoid or pass a moving vessel with reference to which the meeting vessels are navigating, the moving presence of which had, in accordance with passing signals, placed them on crossing courses as to each other, the privileged vessel, fortunate also that she is breasting the current, may alter her course and then as if the burdened vessel were not there at all, swing gradually back under a slowly turning wheel, so as to make an easy sweep back to mid-channel, conditions which must vary with each different steamer and the whim of her navigator,

then the burdened steamer can have no safety but to tie up. The discretion, the liberty, the license placed with the privileged vessel is too great, too easy of abuse. One may expect and forecast a natural and reasonable manœuvre under the particular circumstances and act accordingly, but one may not tell what shall seem natural and reasonable to another who has full license in determining his "natural and reasonable manœuvre under the circumstance" to leave out of the account your very presence.

In speaking of an overtaken vessel altering her course to avoid a pilot boat, the overtaken vessel coming into collision with her later, Lord Esher, M. R., said :

"If the regulations had been applicable I should have thought that, when she was aware of a vessel coming up behind her, she had no right to break from her course, whatever that may mean, without being bound to look round to see where the other ship was at that time."

The *Banshee*, 6 Asp. M. L. C., 221-223.

The New York might at least have someone "to look round to see where the other ship was," even if not bound to regard her presence.

This is in no wise limited by the subsequent opinion of the Circuit Court of Appeals on petition for rehearing (86 Fed., 815), which was not included in the certificate, and presumably, therefore, not filed until later. In that the court loses sight of their definite findings as to the courses, the presence of the *Conemaugh* in or "dangerously" near the course of the New York, even as defined by the court, and overlook the found facts that the last barges in the tow, in the wake of which they say the *Conemaugh* was "swing-

ing slowly to starboard," were heading "two or three points towards the American shore from the course of the river and channel" (280), which, under the process of rounding to would broaden constantly. Being in their wake would place the Conemaugh in such relation to the tow and the New York as to refute the deductions of the opinion on rehearing, and we dismiss it from consideration.

We ask this court not to sanction or place such construction on the starboard hand rule as will compel withdrawal from navigation of a vessel which by force of temporary circumstances, such as a passing tow, may bring another on her starboard hand, but hold the burdened vessel to her duty under the statute certainly, and quite as certainly hold the privileged vessel to her correlative duty.

By reason of the tow, the privileged vessel here could not maintain her course and speed. She could have held her course by checking until the barges were drawn out of her way, and could have deviated enough to clear the barges without involving risk of collision with the Conemaugh.

SECOND.

The channel between the Canadian shore and the rear barges of the tow available for the navigation of the vessels.

Arguments in this case on either side are based upon opposing contentions as to material facts, and we therefore call attention to a well established rule of law, which, it would seem, should be invoked in determining the questions of fact.

Where a party has withheld the best evidence of a material fact claimed by him, or has not produced witnesses

whom he might have called, the presumption is that such evidence, if produced, would have been detrimental to, or would have disproved his contentions.

The *Vaderland*, 18 Fed., 736.

Clifton vs. U. S., 4 Howard, 246.

Gulf Co. vs. Ellis, 54 Fed. 481.

The libel and answer agree that the collision was close to the Canadian bank of the river, not more than the length of the New York (270 feet) therefrom.

The libellant claims that there was ample room for purposes of navigation to the eastward of the tail end of the tow, while the respondent claims that the New York passed only 10 or 20 feet from the last barge in the tow, and that there was not room for a vessel to safely pass her starboard side to starboard side.

The testimony is as follows :

The river left clear to eastward of tow is judged by Captain Miller (18) about 750 feet. Priest, lookout, (46), a broad expanse of water. Capt. Powrie, master of Burlington, (63-80), one-third of river (900 to 1,000 feet). Jordan, mate of Burlington, (83), 600 or 700 feet. Capt. Jeans, master of Amaranth, (87), 700 or 750 feet. Capt. Smith, of Ferguson, (96-99), one-third of river, 900 to 1,000 feet. Kelley, wheelsman, did not notice tail end of tow. Capt. Smith, of the Wesley, (129), one-third of the river. Merrill, wheelsman on the last barge, the Ferguson, (130), collision 1,000 feet away. Davidson, wheelsman on Wesley, (135-6), one-third of river. Hogan, second mate of Conemaugh, (141), lots of room; two and a half to three lengths, (625 to 750 feet.) May, watchman on Conemaugh, (158), about

1,000 feet. Crowe, deckhand on Conemaugh, (175), between one-quarter and one-half the river.

The length and position of the tow would make it impossible for the whole river to be virtually blocked. Miller, (25), tow half mile long. Powrie, master of the Burlington, gives length of vessels and tow lines as follows: (61), Burlington 145 feet, Wesley 150, Republic 148, Ferguson 135, Wesley's tow line 600, others from 500 to 300—2,428 feet. As the Burlington at time of collision was headed up stream getting lines out to Smith's coal dock, and at least her first barge in tow was also headed practically up stream, while the third and fourth barges were headed some down stream, the space must have been quite as great as any witness states.

There is no opposing testimony, and the district judge found that the space was 800 or 900 feet (53 F. 554).

From the above it appears that there was a sufficient channel for the New York and Conemaugh to have navigated in safety, as shown in diagram No. 1, and this should determine the case in favor of the libellant.

The practical ability of two such vessels to meet and pass with safety, in a space of that width, has been demonstrated by years of navigation on the lakes and their connecting waters. No artificial channel has been made by the government in these connecting waters as wide as that which was left open by the tow.

As illustrations:

The St. Mary's Canal, 3,500 feet long and varying in width from 100 to 300 feet. The new Hay Lake Channel Cut through Little Rapids, over four miles long with a

uniform width of 300 feet and with a cross current varying from three to five miles per hour at its upper end, where vessels must make a sharp turn of three and a half points in entering and leaving. The channel at the lower end of Hay Lake, and through what is called the government dyke, is 300 feet wide for a distance of about five and a half miles, with heavy cross currents, and one sharp elbow or turn of three and a half points. Just below this dyke is a natural channel only about 600 feet wide, where vessels have to make a turn of six points in a heavy current. Until the completion of the Hay Lake channel all navigation to Lake Superior passed through Lake George, with its long winding channel, 200 feet in width. The entrance to the St. Clair river from Lake Huron is a natural channel only 600 feet wide, in which there occurs a current of six or seven miles per hour. The natural channel at the lower end of that river is only 600 feet wide and very tortuous, terminating in the government cut, one and one-third miles long and 296 feet wide between piers. At the lower end of the Detroit river is the famous rock-lined Lime Kiln Crossing channel, which has been lately widened to 440 feet, to meet the requirements of the larger modern vessels.

Numerous other channels, canal and harbor entrances, which are intended to and do care for the needs of navigation, with a width of 300 feet or less, might be instanced, but it seems unnecessary to further demonstrate the proposition, that,

With the space that was open to the eastward of the Burlington's tow, there was nothing unusual, extraordinary or hazardous in one vessel undertaking to meet and pass another vessel therein.

The Conemaugh had been coming down the river at her usual speed of about 10 miles per hour (24) and on a course a little to the American side of mid-channel; her watch had made some bright lights ahead and on the Canadian side of them, and while trying to make these out they got a signal of two whistles from the Burlington, which was then near Smith's coal dock, about one-half mile away, (29), then so far around as to show her green and masthead lights, and the green light of the first barge in her tow, to the Conemaugh. The Conemaugh answered with two whistles, put her wheel hard-a-starboard, and at once checked. Miller, 16.

This was done because the master made up his mind that the white lights he had seen were on other vessels of that tow. He then took up his glasses and succeeded in clearly fixing the location of the tow. He says: (17) "When I found the tail end of the tow I was heading above them. There appeared to be plenty of room for me over there. I steadied the helm to follow the tow back." (20). "The vessel had to be steadied and then ported. At or about the time I steadied the vessel, in looking down the river, I discovered a bright and a red light heading apparently up the river."

The Conemaugh at once blew a signal of two blasts to this vessel which proved to be the New York. Capt. Miller saying: "Having directed my course across the river, I concluded it was the best policy to hang on to that course and leave him on the starboard hand."

As this brings us to the initial movement in the navigation of the Conemaugh, with respect to the New York, we

deem it material to get the positions of the boats and their bearings clearly fixed.

THIRD.

Consideration of the positions and relations of the vessels at the blowing of the first, second and third passing signals of two blasts by the Conemaugh, and the movements of the vessels from the third signal to the time of the collision, presenting in connection with each consideration the law applicable to that situation, covering Points VI., VII., VIII. and IX.

I.

The position of the vessels at the time the Conemaugh blew her first signal of two whistles to the New York, and the respective duties and obligations at that time, and whether the Great Lakes and their connecting waters are "lakes and inland waters of the United States" within the exception of the Act of 1885. 23 St. L. 438.

As illustrative of the situation shown by the undisputed testimony, we have prepared diagram No. 3. This diagram was prepared from the following data (in addition to the testimony already cited, fixing the distance out from shore of the last barge of the tow.)

Captain Miller (17), the New York was then a good mile away.

Captain Robert Smith (125), the New York then a half to three-quarters of a mile below us.

The Conemaugh was then heading at about right angles with the Canadian shore, as shown by Miller (16), Kelley (112), Hogan (138), and several other witnesses. The location of the tow in this diagram is obtained from the testimony of Miller (25), Captain Powrie (62-66), Captain L. P. Smith (96), Captain Robert Smith (125-126).

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

The answer of the New York fixes her course as directed close to the tail end of the tow so as to pass only 10 or 20 feet away from the stern barge.

Captain Jeans, of the Amaranth, next to the last vessel of the tow (87), says : "He was heading pretty near for me."

Q. How long did he continue to head so for you ?

A. I would judge about 10 or 15 minutes.

Captain Smith, of the Ferguson, last in tow (98), says : "He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us."

Captain Miller's idea and intentions in the then situation are clearly shown by his testimony on cross examination (32):

Q. You swung around across the stream under a checked motion. What was your idea when you got across that stream, with your engine moving at half speed, as to other vessels coming up the river; what they were going to do ?

A. I was to keep over to the American (Canadian) side and give them plenty of room.

Q. Suppose you crossed their path to go over there, too close aboard to get by ?

A. If I could cross it it was all right.

Q. And if you could not it was at your peril.

A. No, sir, *there was no doubt in my mind but what I could cross their path.*

Q. *Whose path are you talking about ?*

A. *I am talking about the steamboat that I saw down below there at that time, after I had starboarded the wheel.*

THE LAW APPLICABLE.

The Court of Appeals holds that the Great Lakes and connecting waters are to be regarded as "lakes and inland waters of the United States," and so within the exception to the repealing clause of the Act of 1885, and therefore that Section 4233, Revised Statutes, furnishes the navigation rules applicable to this case.

The North Star, 62 Fed., 73.

The question is whether the Great Lakes are to be considered as "*lakes and inland waters of the United States*," or as *coast waters*, or *high seas*, within the meaning of the Act of 1885, 23 St. L. 438.

The construction given by the Court of Appeals to the words, "lakes and inland waters," is inconsistent with the construction placed by this court in *Moore vs. Transportation Co.*, 24 How., 1, upon almost the identical words in the "Limited Liability Act," Revised Statutes, 4289. It is also inconsistent with the decisions of other courts construing these words.

American Transportation Co. vs. Moore,
5 Mich., 368.
The Garden City, 26 Fed., 766.

In each of these cases it was held that the words "lakes and inland waters" do not include the Great Lakes.

In the Seventh Circuit it was held by the District Court that the law of 1885 did apply to the lakes.

The Robert Holland and Parana, 59 Fed., 200.

It was affirmed without discussion as to this point. 70 Fed., 113.

In *Moore vs. American Transp. Co.*, 24 How., 1-37, the magnitude of lake commerce at that time (1851) is

described. In a report presented to the House of Representatives by the Secretary of the Treasury (55th Cong., 2d Session, Document No. 277) it is shown that the tonnage of the lakes has trebled; that is to say, it has increased from 450,000 in 1868 to 1,350,000 in 1897. In transmitting the document, the secretary says:

"Compared with the shipping tonnage employed in the foreign commerce of the United States, the activity of the lake shipping is far greater. The bulk of transactions in the lake-carrying interests is so large as to rank it among the great conveyers of the world."

This court has already referred to the Great Lakes in this language:

"These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other."

The Genesee Chief, 12 How., 443-453.
Craig vs. Continental Ins. Co., 141 U. S., 638.

In Ill. C. R. R. vs. Illinois, 146 U. S., 387-435, the court said:

"These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas."

And again (437):

"That the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

Speaking as to the term "high seas," as used in section 5346, R. S., the court said, 150 U. S. 261:

"The more reasonable inference is that congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the sea of Galilee in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. *The nomenclature, however, does not change the real character of either*, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term 'high seas' the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit river is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any state of the union."

Then on page 263,

"There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world."

And on page 266:

"It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a state, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which

cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or states or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. *And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.*"

These are waters reached from the ocean, and by treaty the artificial canals used to avoid natural obstructions are open to the use of our own people and the people of Canada, and we submit do not fall within the exception of "harbors, lakes and inland waters of the United States."

But taking the rules of 1864 as governing (sec. 4233):

Rule 19. "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

Rule 21. "Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse."

Rule 23. "Where by rules 17, 19, 20, 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24."

Rule 24. "In construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, and render departure from them necessary in order to avoid immediate danger."

With the boats in this situation, the Conemaugh had an active duty to perform in keeping out of the way of the New York, and the New York had an equally imperative

duty to keep her course ; each had a right to rely upon the other's performance of its duty.

The Delaware, 161 U. S., 467.

"Safety of navigation depends essentially upon the certainty which results from exact adhesion to general and well-known regulations."

The Emma Kate Ross, 41 Fed. Rep., 828.

Citing,

The Sunnyside, 1 Brown's Adm., 227, F. C. 13620.

The Clement, 2 Curtis, 363, F. C., 2879.

The Gitana, L. R., 2 Adm., Ecc., 350,

The Ariadne, 13 Wall., 475.

The New York's duty, as to course, was to continue as she was then going, unless it became necessary to depart from that course to avoid impending peril or any immediate danger, *and in that event her departure must only be to the extent that the immediate danger reasonably demands.*

The John L. Hasbrouck, 93 U. S., 408.

With the general duty resting upon each of these boats, it would seem that the paramount question in determining which violated her duty, might be reached at once in the question of fact as to where the collision occurred.

The question of the space for navigation between the tow and the Canadian shore has been considered. Respondent, unwilling to accept the fact or present the case upon the established fact that the space was eight or nine hundred feet, of which six hundred was available to these steamers, argues that the Conemaugh should have remained above the tow, either by stopping entirely or drifting down with the current until the New York should have passed up.

There is something in the proposition that the vessels

should not have attempted to pass if the space were as narrow as the answer alleges. But even upon such a theory of the case, it is not the *Conemaugh* which should be condemned for not remaining above, but the New York for attempting to go up.

It is a well established doctrine that when such an obstruction is presented, it is the duty of the steamer ascending, breasting the tide or current, to stop until the vessel proceeding with the tide or current, shall get out of the way, because of the greater facility with which the ascending steamer can control her movements.

The Galatea, 92 U. S., 439.

This advantage in the ascending steamer and the rule of law which grows out of it, are recognized in other cases; and in rule 24 of the rules governing the navigation of the Great Lakes, adopted in 1895, and have long been recognized in rules 1 and 3 of pilots' rules for western rivers.

It hardly seems reasonable in view of this well established doctrine that the New York may rush up into danger and shift the burden and responsibility onto the descending steamer, on the ground that the New York, by the grossly negligent inattention and fault of her watch, did not know of the presence of the descending steamer.

We refer to this contention of the New York as showing the unwillingness of the respondent to accept and argue the case upon the established fact as to space left for navigation, and as showing that respondent seems to be governed by the belief that, in some way, the negligence of the New York in failing to note the presence of the other steamer in her vicinity, would, in law, put upon the other

steamer the duty of insuring the New York against the consequence of her own inattention; and this while the descending steamer was exhibiting proper lights, distinctly seen by everyone except the watch of the New York, and advertising her presence and announcing her intention by appropriate signals of a steam whistle, heard by everyone except the watch of the New York; lights and signals which must have been seen and heard by an attentive watch on the New York.

But we present our argument as to the duty and conduct of the two steamers when the Conemaugh's first signal was blown to the New York, based upon the conditions of navigation as fixed by the uncontradicted testimony and illustrated in diagram 3.

Respondent seems to contend that if there was such space it was the duty of the Conemaugh to pass between the New York and the tow, leaving the New York to port, under rule 18, that if two vessels under steam are meeting end on or nearly end on, each shall port her helm, and Inspectors' rule 2, that when steamers are approaching in an oblique direction, they shall pass to the right of each other as if meeting head and head or nearly so, and give signals as in that case specified.

This contention ignores entirely the then course and heading of the Conemaugh, which was at that time under way. The Conemaugh, at first uncertain of the nature of the tow which was rounding to, had just starboarded and come on a course substantially across the river. The Conemaugh and New York were on crossing courses, a situation governed by statutory rule 19, which required the Cone-

maugh to keep out of the way, and the complementary rule 23, requiring the New York to hold her course, both which rules are qualified by rule 24, requiring, generally, such precautions as the peculiar circumstances may in any case demand.

Rule 18, for meeting head and head, clearly did not apply. Inspectors' rule 2 did not apply, for the double reason that that rule is simply an extension of rule 1, not intended to apply to vessels on crossing courses, but to vessels, which although not strictly meeting end on or nearly so on substantially opposite courses, are approaching on oblique and converging courses, and only when vessels are near enough to involve risk of collision, which the rule seems to fix at one-half mile, while the situation at that time clearly involved no risk of collision, and the vessels were not less than a mile apart.

The Delaware, 161 U. S., 467.

The master of the Conemaugh had, with the aid of his glass, just located definitely the last vessel in the tow; he was observing critically the space between the tow and the Canadian shore; he saw the mast-head and red light of the propeller New York, and recognized her as a steamer coming up the river. He was then chargeable with knowledge of her proper course, which is agreed in pleading and in the testimony, would be such as to take her close by the tow, leaving no room between the proper course of the New York and the tow for a vessel to pass. This is stated in the answer. Although the master of the Conemaugh might not be able to determine at the time whether to accomplish this the New York would alter her helm, he was chargeable

with notice that if she came on, it was her duty to change only sufficiently to carry her clear of the tow, resuming her course up the river promptly after clearing.

The *John L. Hasbrouck*, 93 U. S., 408.

It was the right and the duty of the *Conemaugh* to assume that the *New York* would perform her duty in that respect.

The *Delaware*, 161 U. S., 468.

Since the space for navigating was so great that the master of the *Conemaugh* could only be justified in concluding that the ascending vessel would not remain below, the duty resting upon the *Conemaugh* was clear and unmistakable to keep out of the way of the *New York* by directing her course to pass in toward the Canadian shore and out of the legal course of the *New York*. In this decision there could be no fault had the vessels been in such proximity that necessity for precautions, other than the proper determination of the conditions of navigation and the duties of the vessels in respect to passing, had arisen.

The respondent, assuming that the Inspectors' rules applied and had come into operation, contends that they required the *Conemaugh* to port her helm, regardless of the tow and the physical obstruction it presented so close to the *New York's* course. The proposition is thus made that the duty of the *Conemaugh* was to take the pathway which was, by law, given to and imposed upon the *New York*.

This contention is open to two objections.

First. Statutory rule 19 leaves it optional with the steamer required to keep out of the way, to do it in such manner as she may choose, fixing upon her the imperative

obligation to get out of the legal course of the privileged vessel; at the same time, rule 23 makes it entirely safe for her to depend upon the privileged vessel pursuing her lawful course. Any rule taking away this option and requiring this to be done in a certain manner would be in derogation of the statutory rule and so far as inconsistent with it, invalid.

The B. B. Saunders, 25 Fed., 727.

The Atlas, 4 Ben., 27 F. C., 633.

The Transfer No. 4, 44 Fed. Rep., 303.

The Ottoman, 74 Fed. Rep., 316, 319.

Second. Rule 24 requires that in observing the rules due regard must be had to the special circumstances.

The Sunnyside, 91 U. S., 208-222.

"Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters."

And, quoting the language of Judge Benedict :

"She (the vessel having the other on her starboard side) was at liberty to keep out of the way of the Kate by porting or by starboarding, as the case required, and it was a fault in her to port, if starboarding afforded the only opportunity of avoiding the disaster."

The Atlas, cited above.

Cases cited below in support of the contention of respondent are entirely beside the question.

The Johnson, 9 Wall., 144-146, was decided before there were any Inspectors' rules, and before statutory rule 19 was enacted, and under somewhat different rules as the report shows. But beyond this, the diagram at p. 149 of

the report shows the vessels approached on slightly oblique courses, virtually head and head, because the divergence in their courses is due to a bend in the river, and further, that the reasonable and prudent course would have been to port the helm, there being nothing to interfere with that manœuvre.

See *The Clarion*, 27 Fed., 128.

The same remarks apply to the *Grand Republic*, 16 Fed. Rep., 424, the court there holding the Inspectors' rule not necessarily so in conflict with the statutory rule giving the vessel bound to keep out of the way the right to exercise her discretion, as to render the Inspectors' rule void, in a case where, as the court said, "*there was nothing to make it necessary to depart from this rule.*"

The proposition that the lawful course of the *New York*, if pursued, brought her so close to the tow, and thence up the river in such a line as to make it physically impossible and highly improper for the *Conemaugh* to attempt to pass in that way is not attacked by any testimony and is expressly admitted in the answer.

II

The position of the vessels at the time the *Conemaugh* blew her second signal of two blasts to the *New York*, and the obligations at that time; the question of the extra-territorial application of the Supervisors' Rules; the Canadian statutes governing, and whether the court should regard the Canadian law without technical proof.

We particularly call the court's attention to the following testimony of Captain Miller, direct examination. (17).

A. Having directed my course across the river, I con-

cluded it was the best policy to hang on to that course and leave him on the starboard hand.

Q. He was, of course, on your starboard hand in the situation you have described?

A. Yes, sir.

Q. What did you next do?

A. I gave him a signal of two blasts.

Q. And at the time of giving that signal of two blasts the second signal of two blasts, what lights did you see then on the New York?

A. *The masthead, the red and the green.*

Q. What is your impression, estimate, about the distance which separated the two vessels at that time; the second signal of two blasts?

A. Somewhere in the neighborhood of three-quarters of a mile, I think.

(18)

Q. You were then proceeding on what course; how were you heading with reference to the Canadian shore or the trend of the river?

A. A trifle down the stream.

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Cross-examination by Mr. Wisner. (36).

Q. And you took that position, because you firmly believed that there was room enough to get across his bow before he could reach you if he kept in that way?

A. Yes, sir.

Q. Did it occur to you—I will ask you again—at that time when you were considering the rights of the New York, and your own obligation, what was to be done with this string of three barges between you and the New York?

A. I had got down (done) with them, I had found the tail end of them.

Q. *But what did you think the New York was going to do with them?*

A. *He was going to have plenty of room to pass between us and the tow.*

Q. *Then your notion was that the New York was to*

come on and pass between the Conemaugh and the rear barges of the tow?

A. Yes, sir.

* * *

Q. You had got on a course that would certainly clear you, so far as the stern barges were concerned?

A. Yes, sir.

Q. So any anxiety you might have had was disposed of when you had accomplished that? Isn't that so? Any anxiety you may have had with reference to that tow and her barges you had gotten rid of by getting your boat around so that you would steer clear of them?

A. Yes sir.

Q. When you blew the New York that signal of two blasts your mind was perfectly easy?

A. Just before I blew it, no.

Q. Blowing it did not disturb you?

A. I had to get out of his road then. He had the right of way.

Q. He was a mile away?

A. At that time he was not showing only his red light.

Q. Did that induce you to repeat your signal any quicker than you would if he had been showing you both his lights?

A. Yes, sir.

Q. Then you hadn't waited as long as you usually wait?

A. No, I think not.

Q. And you repeated that signal of two blasts to him, and about that time he showed you both of his lights?

A. Yes, sir; at that time I got a glimpse of both.

Q. Did he open it or did you open it?

A. It appeared I was opening it.

Q. You think you were opening it?

A. Yes, sir.

Q. Now, the failure of the New York to answer your first two blasts did not cause you to make any change in the course of your vessel?

A. No, sir.

* * *

Q. And you blew him another two about the time you opened the starboard light.

A. Yes, sir.

Q. Standing on the same course across the river?

A. I think by this time we had started to follow the tow back again.

Q. Had you steadied?

A. Steadied, and after they steadied, followed the tow back again.

Court: You had ported when you sounded the second signal of two blasts?

A. Yes, sir, we swung the port wheel slow.

Mr. Wisner.

Q. When did you give that order to port?

A. Soon after steadying, when I found we were heading up the river above the tow, then I sung out, steady, follow them back, follow the tow back so as to keep that distance off of them.

Q. With reference to blowing the first two blasts, when was the helm ported?

A. It was at or about that time.

Q. Then, in fact, when you were in that condition or anxiety of mind, seeing the port and the masthead light of the propeller New York, and realizing your duty to get across his bow, get out of his way, you ported your helm instead of keeping on and getting out of his way? Is that what you mean to say now?

A. Then I was swinging slowly under a port helm.

Q. When you opened his starboard light, you knew how he was heading, didn't you?

A. Yes, sir.

Q. And you blew him two whistles again?

A. Yes, sir.

* * *

Q. Than his failure to answer you didn't make any difference with the navigation of your boat, did it?

A. No, sir.

Mr. Hogan, second mate of Conemaugh (139).

Q. Now, Mr. Hogan, how much did your vessel port, in your best judgment, we will say from the heading directly across the stream?

A. Well, I should say somewhere between three or four points.

* * *

Q. Was there any answer to your first signal of two blasts?

A. No, sir, not that I heard.

Q. When that signal was repeated, as you now state, did you then look down to see what you were signalling to?

A. Yes, sir.

Q. What did you see?

A. I saw a propeller down the river below this tow.

Q. What signal lights was that propeller exhibiting to you?

A. Two colored lights and a headlight.

Kelley, Wheelsman (112):

Q. Under that order, port a little, follow the tow, what did you do, if anything, with your wheel?

A. Well, I gave her about half a turn to port, to let her come around easy.

Q. What was the next order that you got?

A. The next order was steady. We had got around, and we were slanting down the river.

Q. How much do you think you were slanting down from straight across the river when you steadied her at that time?

Mr. Kremer: After porting?

A. After we ported we steadied.

Q. I know, and you say you were slanting across the river; how much were you heading down from straight across?

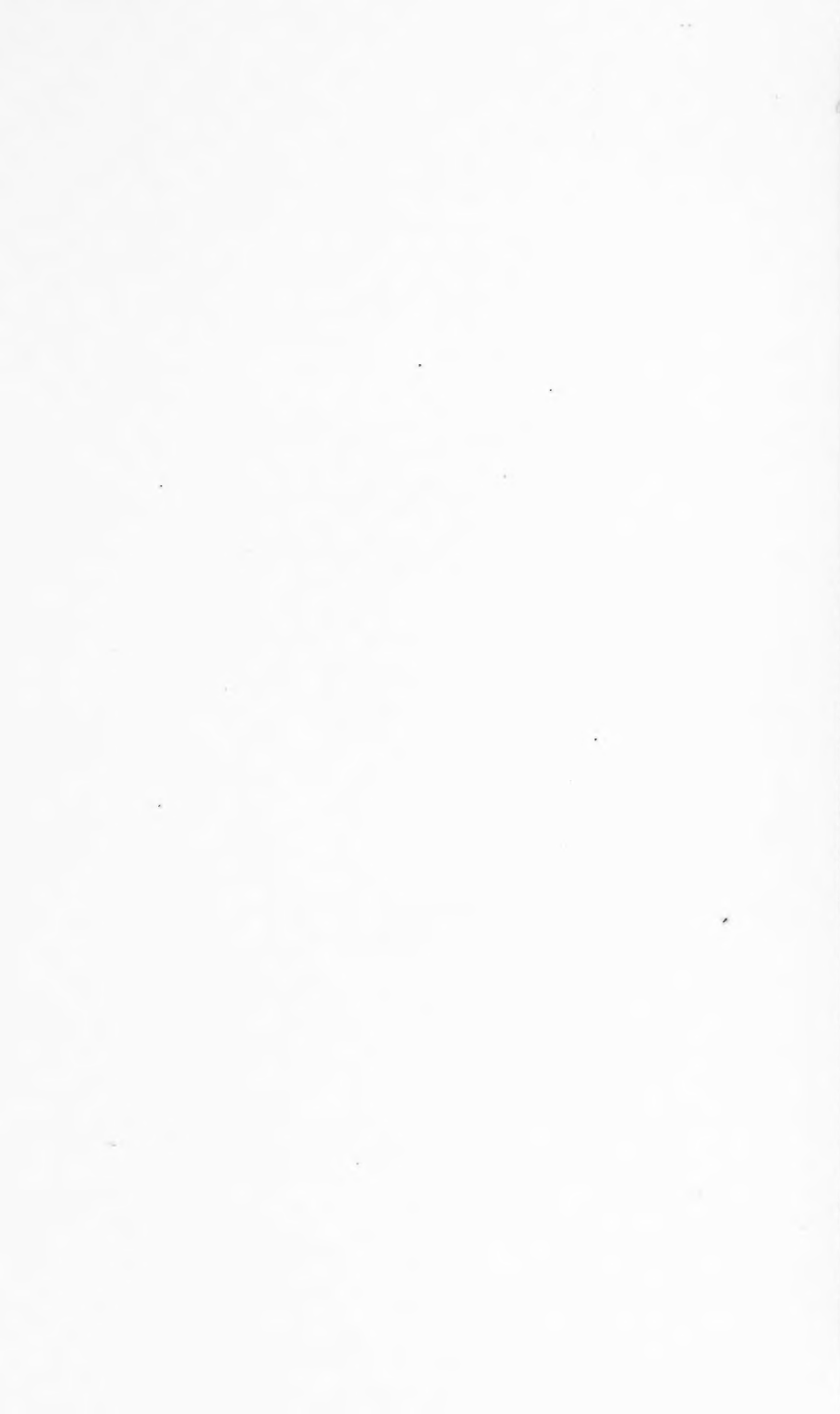
A. I should say about two or three points.

In addition to this testimony the following established facts are cited:

First, the speed of the New York was about ten miles an hour, or twice that of the Conemaugh.

(Record, 19, 65, 99, 125, 131, 134, 192.)

Second, the speed of the Conemaugh was about four and a half miles per hour. Black, engineer (121).



Third, the tail end of the tow was doing little more than drifting with the current, which is about one and three-quarters or two miles per hour. Record, 87, 105, 183, 191.

From the above data we have prepared a drawing showing the positions of the boats at the time that the master of the Conemaugh blew this second signal of two blasts to the New York.

See diagram No. 4.

THE LAW APPLICABLE.

At and from this time the Conemaugh was navigating wholly in Canadian waters. The provisions of the Canadian statute are similar to those of our act of 1885.

We contend that the Supervising Inspectors' rules have no extra-territorial force or application;

That in event of collision the law of the place must be looked to for the rules governing; that by the law of Canada the Conemaugh was not only justified in her maneuver at this time, but she acted in strict accord with its requirements;

That if the Supervising Inspectors' rules apply, the Conemaugh was justified in her maneuvers, and their only effect would be to further condemn the New York.

The Board of Supervising Inspectors is created by Title 52 R. St., U. S. The act prescribes their powers and duties; declares what vessels are subject to the act, and when and where so subject.

Chapter 1 begins with Sec. 4399 and ends with Sec. 4461. Section 4400 provides that

"All steam vessels *navigating any waters of the United States* which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title."

Section 4401 provides that

"All coast-wise sea-going vessels and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam *and navigating as aforesaid* (i. e., within the jurisdiction of the

United States,) shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, *as provided by this Title.*" * * *

By section 4412 it is provided that

"The Board of Supervising Inspectors shall establish such regulations to be observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety." * * *

Section 4405 :

"The board shall establish all necessary regulations required to carry out, in the most effective manner, the provisions of this Title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law."

The board established eleven pilot rules (general rules and regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, as amended January, 1891, pages 53, 54 and 55).

Section 4412, and the rules of the inspectors, must be read and construed with section 4401 :

"all vessels propelled in whole or in part by steam and navigating as aforesaid," (within the jurisdiction of the United States,) "shall be subject to all *the rules and regulations established in pursuance of law for the government of steam vessels in passing as provided by this Title.*"

thereby subjecting such vessels to rules established in pursuance of the title. when "*navigating any waters of the United States,*" and then only.

Marsden on Collisions, at page 209, states the general rule,

"That as to rights and merits, the law of the place of collision (*lex loci*) and as to remedies and procedure, the law of the tribunal (*lex fori*) is to prevail."

Story, "Conflict of Laws," chapter 14, paragraph 558, (7th ed.), p. 702, says:

*"In regard to the merits and rights involved in actions, the law of the place where they originate is to govern. * * ** But the forms of remedies, and the order of judicial proceeding, are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties or origin of the right, or the country of the act."

See also 1 Parsons on shipping and Adm., 529.
The M. Moxham, L. R., 1 P. D., 107.

Cooley on Torts, 471.

Smith vs. Condry, 1 How., 28.

The Scotia, 14 Wall., 117.

The Delaware, 161 U. S., 459.

The Scotland, 105 U. S. 24-29.

Turner vs. St. Clair Tunnel Co., 111 Mich. 578.

The requirements of the Canadian statute applicable to the situation in which the Conemaugh found herself are as follows:

"Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

"(a) This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

"(b) The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day each ship sees the masts of the other in a line, or nearly in a line

with her own ; and, by night, to cases in which each ship is in such a position as to see both the side lights of the other.

“(c) It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

“Article 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

“Article 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

“Article 19. In taking any course authorized or required by these regulations, a steamship under way *may* indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say :

“One short blast to mean, ‘I am directing my course to starboard’;

“*Two short blasts to mean, ‘I am directing my course to port’;*

“Three short blasts to mean, ‘I am going full speed astern.’

“The use of these signals is optional, but if they are

used, the course of the ship must be in accordance with the signal made.

"Article 22. When by the above rules one of two ships is to keep out of the way, the other shall keep her course."

The above requirements were, we submit, the ones in force from the time the *Conemaugh* and the *New York* were sufficiently near each other to involve any risk of collision. These rules are the outcome and the recommendations of the International Congress which was called to frame and recommend such rules as time had proven most safe and practicable, and whether this is held to be the law by which the *Conemaugh's* actions are to be measured or not, it is clear that Captain Miller's actions are thereby indorsed as good and prudent seamanship.

The Circuit Court of Appeals held that there was not sufficient technical proof of the Canadian statute as a foreign law, but it is clear from the opinion that the statute was in fact before the court, and our contention is that a court of *Admiralty* will take judicial notice of foreign regulations for the prevention of collisions without such technical proof as might be required by a common law court in an ordinary action.

Talbot vs. Seeman, 1 Cranch, 1.

The Scotia, 14 Wall., 170-186.

Marsden on Collisions, 310-340.

Wharton on Conflict of Laws, Sec. 771.

Wharton on Evidence, Secs. 285, 331.

But if the rule is otherwise, then, in the absence of technical proof, the general maritime law will be presumed

to exist in Canada, and under that law the *Conemaugh* was not obliged to port and go astern of the *New York*, but might cross her bows at a proper distance ahead.

The Canadian statute which was before the Circuit Court of Appeals is printed in Howell's Admiralty Practice (Canada), p. 239, where the author states in a footnote:

"The Imperial Regulations upon which these are founded, and which came into force 1st September, 1884 (Order in Council, 9 P. D., 248), apply to British, and by international assent, to French, Italian, Greek, Portuguese, Norwegian, Swedish, Brazilian, Turkish, Chilian and Danish ships and boats (Marsden's Law of Collisions at Sea, 3d Ed., 358). The United States have adopted regulations very nearly corresponding."

In the report of the Commissioner of Navigation for 1885, at p. 136, the Commissioner says:

"This code, which is now accepted as an integral part of the law of the sea, embodying the 'rule of the road,' in so far as navigation outside of the territorial waters of this country is concerned, was formally adopted by the United States Congress March 3, 1885. The attention of all persons concerned was immediately directed to the changes in the steering and sailing rules made by the act referred to, by a circular issued from this office under date of March 25 following (Treasury Department No. 40), which contained the new act printed side by side with the old law. The text of the Revised Regulations, which, although observed by all vessels on the ocean, is now given the sanction of law in the navigation of public and private vessels of the United States upon the high seas, and in all coast waters of the United States except harbors, lakes and inland waters, is subjoined."

In Gould & Tuckers' Notes, Ch. 5 (Navigation), p. 785, speaking of the rules fixed by Sec. 4233, R. S., it is said:

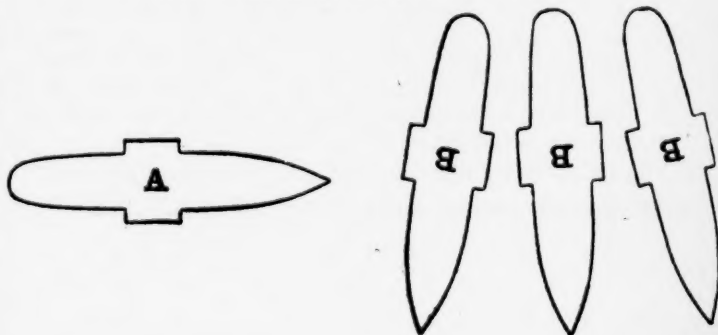
"These rules were adopted by more than thirty of the principal states of the world, and were at once regarded as entitled to judicial notice. The *Scotia*, 14 Wall., 170; 3 Blatch., 308; The *Sylvester Hale*, 6 Ben., 523. The Revised Code was adopted by Great Britain in 1884, and this and the regulations of 1863 are set out in parallel columns in Marsden's *Law of Collision* (2d. ed.), 471-485. This Revised Code has been adopted by the leading nations, and is the act of March 3, 1885, ch. 354 (23 St., 438)."

In the situation shown by diagram No. 4, the vessels are not in position to demand the application of rule 2 of the Supervising Inspectors, but in that situation the Inspectors expressly instruct masters that they shall *not* undertake to pass port to port, quite aside from any such conditions as that presented in this case, by the presence of the tow.

The Supervising Inspectors, in connection with their rules, say: "The following diagrams are intended to illustrate the working of the foregoing system of colored lights, and are to be used by pilots in connection with the rules, as sailing directions on meeting or nearing other steamers."

See situations pictured by inspectors.

The seventh situation is precisely that in which the *New York* and *Conemaugh* are placed.



Let the vessel marked "A" by the Inspectors represent the New York and "B" the Conemaugh, and in their instructions substitute these names for the letters used by the Inspectors. The situation shown in our diagram 4 is described and instructions thereby furnished to both the Conemaugh and New York as follows:

"In this situation the steamer New York will only see the green light of the steamer Conemaugh in whichever of the three positions that the latter may happen to be, because the red light will be hid from view. The New York will be assured that the starboard side of the Conemaugh is toward him, and that the latter is therefore crossing the bows of the New York in direction to starboard. The New York will therefore (if so near as to fear collision) starboard his helm with confidence and pass clear. On the other hand, the Conemaugh, in either of the three positions, will see both the red and green lights of the New York, by which the former will know that a steamer is *approaching directly toward him*. The Conemaugh will act accordingly, and *keep away if necessary*."

Thus if we are to look to the Inspectors for guidance, we find assurance given to the Conemaugh that the New York would not port.

After blowing this second signal the Conemaugh continued on, and some criticism is offered on the ground that "not hearing a reply from the New York, the captain of the Conemaugh should have construed that as a dissent." In this situation, we do not see why a failure to answer should be construed into dissent. The Conemaugh knew what the passive but imperative duty of the New York was

and had a right to navigate in reliance upon performance of that duty.

The Emma Kate Ross, 41 Fed. Rep., 828.

The John King, 49 Fed. Rep., 469.

The John L. Hasbrouck, 93 U. S., 408.

The Delaware, 161 U. S., 461-467.

If the law of Canada applied, signaling by whistle is optional and solely to indicate what the person signaling is going to do. The provision is, "the use of these signals is optional, but if they are used, the course of the ship must be in accordance with the signal made."

Criticism of Captain Miller for assuming to proceed in reliance that the New York would fulfill her duty and keep her course, even though she did not signal, is answered by the language and cases quoted with approval by the Supreme Court in the *Brittania* (153 U. S., 143) as follows :

"The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course and keep their speed on that assumption."

Hutchins vs. Northfield, 24 L. C. P. Co., Rep., 680-681.

In the case of the *Elizabeth Jones*, 112 U. S., 514-523, it was said :

"Conceding it to have been the duty of the *Willis*, under article 12, to keep out of the way of the *Jones*, it was equally the duty of the latter not to baffle or prevent the efforts of the *Willis* to that end. Her departure from the requirement of article 18, that she should keep her course, cannot be justified under article 19, because there were no special circumstances which rendered such departure necessary in order to avoid immediate danger."

In *Belden vs. Chase*, 150, U. S., 699,

"Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

In *the Free State*, 91 U. S., 200,

"It is the duty of a steamer to keep out of the way of a sailing vessel when they are approaching in such directions as to involve a risk of collision. The correlative obligation rests upon the sailing vessel to keep her course, and the steamer may be managed upon the assumption that she will do so."

In *the Britannia* case, the court further said, p. 144,

"It is true some of the cases just cited were cases wherein the vessel whose duty it was to keep her course was a sailing vessel, yet the principle involved is the same in the case of two steamships crossing, where it is the duty of the one who has the other on her starboard bow to keep out of the way of the other, and of the latter to keep on her course."

It must be conceded that the *Conemaugh's* crew were properly stationed and on the lookout; a full watch of competent and experienced men, exercising their best judgment.

Let us look at the *New York* as she is presented to the court, just after having this second signal blown to her by the *Conemaugh*. The answer states that the officers of the *New York* neither saw the lights of the *Conemaugh* nor heard her whistles, and charges that the *Conemaugh* neither had the proper lights nor blew proper passing signals (13.) Fault is charged against the *Conemaugh* as follows: "In not carrying the lights required by law brightly burning and properly displayed." Also, "in not blowing proper passing signals." This was in answer to the libel which charged the *New York*. (1), "In not keeping a proper and suffi-

cient lookout." (2) "In being in charge of incompetent, reckless and negligent officers." These were serious charges, and when a party considers it wise to resort to ingenious argument to repel them rather than let the court see and judge of the crew and hear their story and sworn excuses, it amounts to a confession that the allegations of the libel could not be refuted. Where so much depends upon questions of fact, such a defense, as that instituted for the New York, is so colored with suspicion as to call for no guessing in its favor. In the court below, respondent offered its first excuse for not seeing the lights of the Conemaugh. They put the crew of the New York behind imaginary high lumber piles on the barges, and went so far as to refer to record page 110, as showing "lumber cargoes piled high above the rail," to support the excuse. The testimony was as follows :

Q. Your deck load, you stated, was ten feet above the deck, or rail ?

A. Above the deck.

Q. Making the top of your deck load how high above the water ?

A. Eleven feet. (110)

The height of the Conemaugh's colored lights (being the lower ones) was drawn out on Mr. Wisner's cross-examination of Captain Miller and shown to be 26 feet or more above the water (22). The New York was larger than the Conemaugh and of the same style. If her officers were on deck, their line of vision must necessarily have been high above these deck loads.

In a formal brief filed in the District Court soon after the testimony had been taken in open court, counsel for the New York stated as follows :

"The answer admits the failure of the New York to hear the signals of the Conemaugh, or see her lights, and as the Conemaugh clearly proved the blowing of the signals three separate two blasts and the exhibition of proper lights, when she rested her case, we saw no reason for consuming further time by putting in testimony which could only confirm those admissions, and also rested the case of the New York.

This was an admission that the New York's witnesses, who were in court, could offer no exculpatory facts.

We approach the meeting of these vessels with faults virtually conceded on the part of the New York and without an effort on her part to meet the requirements of the law that she must show that these faults did not contribute to the collision. We submit that the New York coming up, with the eyes and ears of her watch closed, is in splendid condition to maneuver so as to thwart any timely measures taken by the Conemaugh. This condition particularly called for the criticism offered by the District Judge, who says, 53 Fed. Rep., 553-555:

"The admitted facts that her officers did not even hear the first two signals of the Conemaugh, and, though their attention was challenged to her by her third whistle, they did not see her until the alarm whistles were sounded, when the vessels were scarcely a quarter of a mile apart, although the weather was favorable to sight and hearing and the conditions of the locality call for careful navigation, are conclusive that her master and lookout, if she had one, were either incompetent or grossly negligent of their duties. If her lookout saw and reported the lights of the Conemaugh, his exoneration makes the conduct of the master or other officer of the deck, in disregarding that warning, more reprehensible. The Conemaugh's whistle was loud

and coarse, and her lights lawfully placed and burning. Nothing can palliate the negligence which failed to notice either. If the master were at his post, or giving attention to his duties, he should have heard or seen the descending steamer, despite the negligence or even the want of a lookout; for the lights were seen and the signals heard by the crews of the Burlington and her barges, and by persons at the coal dock, who were at a greater distance from the Conemaugh than the New York."

The Ottoman, 74 Fed. Rep., 316.

The Oregon, 158 U. S., 186.

III.

The position of the vessels at the time the Conemaugh blew her third signal of two blasts to the New York, and the respective duties of the vessels.

See Diagram No. 5.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED



The testimony as to the position of the boats at the third signal is conclusive and uncontradicted, showing with approximate accuracy the correctness of diagram No. 5.

Capt. Miller, (18):

Q. And at the time of the sounding this third signal of two blasts, what lights did you see on the New York?

A. The same lights.

Q. And three then?

A. Yes, sir.

Court. What lights were you showing him then?

A. The bright light and the green light.

Mr. Goulder. Q. You were then proceeding on what course; how were you heading with reference to the Canadian shore or the trend of the river?

A. A trifle down the stream.

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Q. You may state whether you continued to observe this New York?

A. Yes, sir.

Q. Did you get any answer to your third signal of two blasts?

A. No, sir.

Q. Now, at that time, you may state whether you could or whether you did see this tow, the end of it, the stern barge, and if so, where it was in relation to your vessel and in relation to the Canadian shore?

A. The tail end of the tow at that time was a little forward of our starboard beam and apparently about three lengths of our vessel or thereabouts off from the Canadian shore.

Q. How far did she appear to be below you in the stream, the last barge in that tow?

A. She appeared to be the same distance, about three lengths.

Cross-examination (39):

Q. Where were you when you repeated your signal for the second time, which would be the third signal?

A. Then we were pretty nearly abreast of the tail end of the tow.

Q. Where was the New York?

A. I could see the New York then. He appeared to be in here.

Q. Between the two stern barges?

A. He seemed to be coming in that way. He might have been up in here.

Q. Between the second and third from the end?

A. Yes, sir.

Q. You hadn't crossed his line yet?

A. I had both lights open.

Q. But you hadn't crossed his bow when you blew the third signal to him?

A. No, I think not.

Q. He didn't answer that?

A. No, sir.

Q. He kept coming right along?

A. Yes, sir.

Q. Seemed to be pretty close to the tow, didn't he?

A. He appeared to be.

Q. And his failure to answer your whistle made no difference in the navigation of your boat?

A. It was right about this time somewhere between the third signal and the alarm signal when I sung out hard-a-starboard, steady, then hard-a-starboard.

Q. I am just now navigating with you on the Cone-maugh, having twice had my signals of two signals ignored, blowing a third signal to the New York, at which time you hadn't yet passed the stern barge in tow, and the New York seemed to be between the second and third barges, holding pretty close to them?

A. Yes, sir.

Q. She didn't answer that signal?

A. No, sir.

Q. You didn't change your course then?

A. I think it was about that time we steadied.

Q. About that time you starboarded?

A. I said steadied.

Q. Steadied from a port helm?

A. Yes, sir.

Q. About the time he failed to respond to your third signal you stopped swinging under your port helm?

A. Yes, sir.

Q. He was then showing you both his side lights?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then about that time.

Captain Smith of the Ferguson (98), speaking of the New York:

He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us. I put my wheel hard-a-port, and almost immediately he ported his wheel, or must have, because he had his green light from us.

Q. As the New York was coming at the time, you say, you think you observed her porting, where would she have gone had she held that course and come right along, when you thought you observed her porting, before you lost her green light?

A. She would have come right through the Amaranth or me; struck us.

Q. You may state whether or not that was your judgment at that time?

A. That was my judgment at that time; she was either going to hit the Amaranth or myself.

Q. How far did she clear you?

A. From 50 to 100 feet, I should judge.

Q. At that time, how were you and the Amaranth with reference to each other; for instance, first, how were you heading as to the Amaranth, when that steamer came up by you?

A. We were both heading a little diagonally across the river. Probably swinging from the American (Canadian) side of the river from two points about to starboard.

Q. Do you remember how you were heading as to the Amaranth?

A. We were both heading about the same. I should judge I was astern of her, may be heading on his quarter. It looked as if we were heading about the same.

Hogan, Record (140-141):

Q. At the time when your third signal of two blasts was given you looked out and saw the red light, whereabouts was the New York then? You can give it in distance from your vessel in lengths, or with reference to the tow, if you can tell about the tow?

A. Well, she was somewhere around the third barge.

Q. Somewhere around the third barge?

A. Yes, sir.

The testimony fixing the distance of the tail end of the tow from the Canadian shore, and that showing the courses of the two steamers has already been given. The testimony given in Part 4 hereof also corroborates the positions shown in Diagram 5.

The duties and obligations have not changed from those in the preceding situation, and the argument there made applies with equal force here. It has become a demonstration that the New York could not collide with the Conemaugh if the former kept her proper course with respect to which the Conemaugh had been navigating, going only so far to the eastward as was fairly necessary to clear the tail end of the tow. In this situation the master of the Conemaugh had the right and was in law bound to presume, that the New York, having adopted a course to clear the tow, would continue on that course. If the New York found upon approaching the tow that she had held out false information to the Conemaugh, and that it would be necessary for her to make another change of course to get around the tail end of the tow, it was her duty to check, and if necessary, stop and reverse below, rather than violate her duty to the Conemaugh by making a radical change.

Diagram five gives the situation of the vessels correctly

when the signal was blown. Such position entirely justifies the course and conduct of the Conemaugh up to that time. The vessels are free from risk or danger of collision if they both act within the law and the practice of seamen.

It is indeed the seventh situation pictured by the Supervising Inspectors in the illustration of their rules. A collision cannot occur unless one of the vessels shall port her helm, and the spring-head of the collision which followed was clearly the porting of the New York, the first element of risk in the case.

The answer confesses that the watch of the New York had not seen or heard the Conemaugh. The last barge and the next ahead of her were heading only two points from straight down the river, so that their sailing lights would have notified a vigilant watch of the exact position of these vessels, which it was her duty to avoid.

Further evidence that this collision is primarily due to the conceded poor lookout and reckless navigation of the New York, is found in the manner of her approach toward the end of this tow.

She approached with the purpose of clearing them, and yet on a course not to clear them, but directly onto the two last barges, so close as to cause them to port in fear of being run down. A proper course early adopted would have called for no violent swing, but the New York coming into close proximity to these barges is suddenly called upon for an extreme move and she also evidently hard-a-ports. That she did this is more than probable, since her answer admits that her navigation was solely in respect to the tow, as she had not seen the Conemaugh,

although the latter was giving all legal notice both of her presence and intention.

We ask the court to confirm the conclusion of the District Judge that the self-condemned watch—ignorant through inattention of the very presence of the Conemaugh despite the latter's lights and signals—and therefore *navigating in the supposition that they had the entire space to themselves*, were not careful in porting, but ported too much, and with the aid of the current, sheered over out of her lawful course, and then, realizing the danger, attempted too late to bring their vessel back to her course by a starboard helm. The Conemaugh was notified of the New York's mistake only when it became evident from her movements, under constant and careful observation, when it was too late for the Conemaugh to take action effectual to avoid the collision.

IV.

The movements of the New York and the Conemaugh from the time the third signal was blown by the Conemaugh up to the time of the collision, and the conclusions to be drawn from such movements.

Having the vessels in the third position, as above shown, it would seem but necessary for the determination of this cause, to locate approximately the place where the vessels came into collision, as with the proper course of the New York known and pointed out, it is conclusive that if the collision occurred on that course, the Conemaugh must be condemned. But if the collision occurred out of the proper course of the New York, then, this deaf, dumb and blind New York must be condemned as the injurious vessel.

The testimony as to place of collision fully bears out Judge Swan's finding in that regard.

Miller (19, 186): Was about our length (250 feet) from the Canadian shore when struck.

Hogan (149): The tail end of the tow was 300 feet below us.

Priest (47): Think we were nearly aground when hit.

Capt. Jeans (88): The collision appeared to be close to the Canadian shore.

Capt. Smith of Ferguson (96): I think she was close to the channel bank. (102) The collision occurred up the river and on the channel bank about 1,000 feet from me.

Capt. Smith of the Wesley (125): I should judge the collision occurred pretty near 1,000 feet above the Ferguson. (128) I should think that the collision was about 1,500 feet above the Amaranth.

Merrill, wheelsman on Ferguson (130): Collision occurred about four lengths of the Conemaugh from us. (133) On the Canadian side.

Davidson, wheelsman on Wesley (135): The collision occurred about 800 feet or so above the Ferguson.

Powrie, master of Burlington (63): Collision appeared to be close to the Canadian shore.

Jordan, mate of Burlington (83): Continued to watch the New York until she passed up stream clear of the Ferguson, and then went to getting lines out. Did not see collision.

Hogan, second mate (152): We were 300 feet above the Ferguson when struck, and she was way out in the river. I do not mean that collision occurred only 300 feet from Ferguson.

Dawson, from coal dock (163): Collision appeared to be 500 or 750 feet above Ferguson.

Linderman (171): Collision about 500 feet above Ferguson.

With the Ferguson 800 or 900 feet from the Canadian shore, and so at least 600 feet out in the stream from the channel bank, and the collision occurring at or on that bank and some 300 to 1,000 feet further up the river than the

Ferguson, and at least a thousand feet from her in a straight line, it seems ~~that~~ more conclusive proof of the continued unnecessary deviation from her course on the part of the New York would be impossible.

We charge that the New York in this case must clearly be condemned for the following reasons:

1. In not keeping proper lookout.
2. In being in charge of incompetent officers.

The admissions of the answer and of counsel, we contend, prove these allegations. Further, the burden being upon the New York to show these faults did not contribute to the collision, she has made no endeavor to meet it. On the contrary, it is inferable, if not apparent and certain, that because of inattention to duties or lack of proper officers on deck, is due the peculiar position in which the New York placed herself with respect to the tow, and which called upon her to make a violent change to clear. Furthermore, when making this change they did not see the Conemaugh, and, therefore, it would seem to follow that no precaution had been taken on the New York to avoid a departure from their course more than was made necessary by the tow, since at that time they did not know that the Conemaugh was navigating with respect to them. *Confessedly owing a plain legal duty to the Conemaugh, and confessedly not knowing anything about the situation*, the case justifies the stricture of the District Judge that,

"The faults of the New York are so many and flagrant that it may be doubted if judicial records afford a parallel to the negligence and recklessness of their navigation."

3. We charge that, having adopted a course close to the tail end of these barges, she was at fault for changing

it when close to them, rather than checking her speed or stopping if she found it necessary or advisable not to proceed on this course with respect to which the Conemaugh had a right to navigate. This proposition we have heretofore argued we think at sufficient length. That a violent change of course was here made is conclusively shown; also the movements of the vessels from the blowing of the third signal up to the time of collision, by the following testimony:

Captain Miller, cross-ex. (18).

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Q. You may state whether you continued to observe this New York?

A. Yes, sir.

Q. Did you get any answer to your third signal of two blasts?

A. No, sir.

Q. Now, at that time, you may state whether you could or whether you did see this tow, the end of it, the stern barge, and if so, where it was in relation to your vessel and in relation to the Canadian shore?

A. The tail end of the tow at that time was a little forward of our starboard beam and apparently about three lengths of our vessel or thereabouts off from the Canadian shore.

Q. How far did she appear to be below you in the stream, the last barge in that tow?

A. She appeared to be the same distance, about three lengths.

Q. To that third signal did you get no answer?

A. No, sir.

Q. Will you give the movements of the vessel from that time until you came into collision?

A. Right after that I lost the green light, then sounded an alarm whistle of several short blasts, ordered my helm

put hard-a-starboard, and he came right along and hit us abreast of our foremast, on our starboard bow.

Q. At the time you sounded the danger signal on losing his green light, whereabouts was the New York with reference to the tail end of the tow?

A. He was somewhere about abreast or between the two last barges.

Q. Somewhere in that vicinity?

A. Yes, sir.

Q. As that vessel approached at the time of your losing the green light and from that time on, how did she appear to you to come up the river as to whether she came directly or was swinging either way?

A. *I didn't notice the lights after that, not after sounding the alarm whistle.*

Q. What, if any, indication in that regard did you get from what you could see of the boat herself?

A. Well, at the time he shut out his green light I was under the impression he was swinging on the port helm.

Q. And that indicated that he was, didn't it?

A. Yes, sir, and the manner in which he struck us, he must have been coming on the starboard helm.

Q. Can you tell the court how far you were from the channel bank when you struck?

A. We were about our length, probably a little more.

Q. From the Canadian channel bank?

A. Yes, sir. (At page 186 the witness states that in giving the above distance he meant, not from the channel bank, but from the Canadian shore line.)

(40-41):

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm?

A. Yes, sir.

Q. He was then showing you both his side lights?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then about that time.

Q. Now, captain, if you hadn't steadied from the port helm you think you would have swung down on the port side of the New York?

A. Yes, sir. (Answer was "no, sir," as shown by next question and answer.)

Q. Then your steadying from a port helm there did not make any difference with the collision?

A. No, sir.

Q. Did you steady?

A. Yes, sir.

Q. Did your vessel stop her swing?

A. I believe so.

Q. And then you blew him a fourth signal of two whistles?

A. No, sir, that was an alarm whistle, several short blasts.

Q. You only blew him three signals of two whistles then?

A. That was all.

Q. The last one was blown just about as you were entering on the stern of the rear barge, and as you passed the stern of the rear barge that I understand you to say, that the green light of the New York disappeared, shut out?

A. Somewhere between the third and the alarm whistle, yes, sir.

Q. Somewhere between the third whistle and the alarm, and before or after you steadied?

A. I think it was right after. I am not positive, but I think it was right after.

Q. What induced you to steady?

A. Because I was not opening his lights quite as quick as I ought to, and losing this light led me to believe they were altering their course.

Q. Did it occur to you that perhaps you were swinging away from that light?

No answer.

Q. *You thought he had ported?*

A. *I thought he had.*

Q. And you thought so because you lost the green light?

A. Yes, sir.

Q. Did you ever have it open bright at all?

A. Quite full.

Q. You had it simply around outside rays of light?

A. I got the edge of the light, at the time I blew the third whistle, the light itself.

Q. And when the light shut out you blew the alarm?

A. Yes, sir.

Q. And you blew the alarm as you came by the stern barge?

A. Yes, sir, I was by the stern barge then, I think.

* * *

Q. When you blew the alarm and pulled out by the stern of the rear barge, you saw the New York coming into you?

A. After I sounded the alarm, yes, sir. It was after that.

Q. Where were you when you sounded the alarm?

A. I had passed the stern barge.

Q. You were by it then?

A. Yes, sir, and then swinging on the starboard helm.

At first (least) the helm was put starboard, being under check she might not have got much way.

* * *

Q. Why did you starboard?

A. Because I had lost the light.

Q. You lost it when you steadied?

A. It was about that time.

Q. When you came out there and blew your alarm, you saw the New York coming right after you, didn't you?

A. I saw her coming pretty fast.

Q. Right into you?

A. He appeared to be so, sir.

Q. At what angle did he strike you?

A. I should think it was something greater than 45 degrees; that is, from the line of our keel (placing models).

Q. You think about four points off your bow?

A. Something like that, and it struck just abaft of the place where I was standing. Our bridge is well forward. It fetched us somewhere in about there. (Indicating models.)

Q. Why did you starboard your helm the last time?

A. I tried to get over as far as I could out of his road, to give him all the room possible.

* * *

Re-direct by Mr. Goulder :

Q. I will just complete Mr. Wisner's line of examination by asking you to state why you didn't reverse?

A. After (I) he had signalled?

Q. *Yes, sir, in that situation tell the court what your judgment about it was, and why you didn't reverse?*

A. *I had signified to this steamer the course I was taking. Had I stopped here and he had seen fit to answer my whistle, I would have been in his road. I was coming with our current at that time, drifting with the current.*

Priest, lookout (46):

Q. I will state here, to get it into the record, that the name of the last barge in the tow was the Ferguson, and that the name of the next in front of her, the third tow barge, was the Amaranth. Now, from the place you saw the New York, at that time, how did she, to your eyes, seem to approach your vessel, as to whether she came straight or whether she wobbled?

A. She seemed to me to be altering her helm.

Q. How did she go?

A. Her port helm seemed to run right in the Canadian shore.

Q. When she struck you how did she seem to be coming?

A. Straight into us. I saw both her lights then.

Q. And how close in to the shore did it seem to you your boat had got at the time you were hit?

A. Oh, I should think we were nearly aground, according to my idea.

Q. Did you notice when you touched the ground?

A. No, sir, I cannot say I did notice it.

Cross-examination (57-58):

Q. She seemed to be swinging around pretty lively, did she?

A. Pretty quick.

Q. And she shut out her green light entirely and showed you a bright red light?

A. Yes, sir.

Q. And that continued until she had arrived at what part of the tow?

A. Well, I should say it was the tail end of the tow, after she passed the tow altogether.

Q. After she passed altogether?

A. Yes, sir.

Q. When the Conemaugh came by the stern of the rear barge and the New York came by the stern of the barge, she was showing you her red light alone?

A. Yes, sir.

Q. You could see her then?

A. I could see the back of her.

Q. And the barges were out of your way?

A. Yes, sir, they were dropping down all the time, and we were dropping down the same time, too.

Q. After you passed the rear of the stern barge, and had open water all around your starboard bow, the only thing in the way was the New York, and she was showing you her masthead light and red light?

A. Yes, sir.

Q. And she seemed to starboard and run into you?

A. Yes, sir.

Q. Now, Mr. Priest, are you satisfied with that statement as correct?

A. Yes, sir.

Cross-examination, (59-60):

Q. She came up continuing to show you that red light until you reached up astern, or until this barge got down by her when she showed both lights?

A. Yes, sir, and struck us at the same time she showed us the both lights.

Q. When she was showing you the red light you think the relative bearing of the boat was about that way? (Placing models.) Your boat was running ahead?

A. Very slowly.

Q. And ran across her course, did it, before you two came together?

A. Yes, sir.

Q. Did she seem to be going around pretty lively?

A. Yes, sir.

Q. Could you see anything on the shore at the time of the collision?

A. No, sir, could see black outlines of the trees, no lights or anything.

Q. What order to the wheelmen did you hear after the last blast of two whistles?

A. Hard-a-starboard.

Q. When was that given?

A. After we blew two whistles; after we blew the last two whistles.

Q. How, with reference to the alarm whistle, before or after that was blown?

A. After the alarm was blown.

Q. Did you stand on the deck all the time until the collision took place?

A. I stood there all the time until she hit us.

Q. What did you do when she hit you?

A. Waited until I was told to go away.

Q. Did you know when she took the bottom?

A. Yes, sir; she took to bottom just after we were struck.

Q. About the same time?

A. About a minute or so.

Q. Pretty near the bank when you struck?

A. Yes, sir, as far as I can judge.

Q. As it seemed to you the boat was pretty near the bank when they came together?

A. Yes, sir.

Q. And the Conemaugh's nose ran in the bank very soon after she was struck?

A. Yes, sir.

Jordan, mate of Burlington, did not see collision. (83):

Q. How long did you continue to watch the New York?

A. I watched her until she passed the last barge, then I went over and got my lines out; we were then pretty close to the dock.

Capt. Jeans, of Amaranth, cross-examination. (88-89).
By Mr. Kremer:

Q. Did I understand you to say that the collision occurred close to the Canadian shore?

A. I think so.

Q. Did you hear the crash of the collision ?

A. Yes, sir.

Q. Were you looking that way at the time ?

A. Yes, sir.

Q. And which side of the Conemaugh was struck ?

A. I think she was struck on the starboard bow, if I ain't mistaken.

Q. And where was the last barge at that time ?

A. The last barge was right astern of me.

Q. Where was the last barge with reference to the collision ?

A. That I don't know; she was coming down the river following me, coming around. She was following my light, I presume.

Q. You were out in the river ?

A. Yes, sir, pretty well across by that time.

Q. And the other barge, had she turned at the time of the collision ?

A. She had begun to turn.

Q. Did the collision occur abreast of the last barge, or just astern of her ?

A. A little astern of her, I would judge.

* * *

Q. When you first saw the Conemaugh, the New York was showing you her red light ?

A. Both of them, red and green light and masthead light.

Q. Before the Conemaugh turned, the New York had also ported, had she not ?

A. A little.

Q. So she was showing her red light ?

A. Yes, sir, showing her red light to keep clear of me.

Q. You saw the New York port and then saw the Conemaugh starboard ?

A. Yes, sir. Well, I was not close ; they were both going over towards Canada.

Re-direct examination by Mr. Goulder (94) :

Q. The New York, you think, when she passed your barge, was headed as much towards the Canadian shore as is indicated in this picture, "New York 3?"

A. I think so, as near as I can tell. Of course, it was pretty dark.

Q. And she kept going over in that way, as you say, until she hit the Conemaugh which was up the river?

A. Yes, sir.

Q. And what, captain, with your vessels in that shape, and the vessel passing you, I think you said within 75 or 100 feet, what was there to prevent the New York from starboarding and coming out alongside of the Ferguson and going up the river?

Mr. Wisner: I shall object to that as not material, because the New York's duty was defined by law, and whether she might have done something else or not in the way of changing her course makes no difference, as she was under no obligation to do so. It would be only putting in the record here something that has no bearing on the case.

Court: You may ask the question.

Q. The New York having come up here, so as to look clear of you, as you say, by closing her green light, what was there to prevent her starboarding in time and coming up here around the Ferguson and out in the river again?

A. That would be a hard matter for me to tell on account I was not aboard of that steamboat, but I should think they had all the chance in the world to do so.

Q. That was your judgment standing there that night?

A. That was my judgment. My judgment is not another man's judgment.

Captain Smith, of the Ferguson, (96), examined by Mr. Goulder:

Q. When the New York passed you, and also at the time of the collision between the Conemaugh and the New York, how far in your best judgment do you place your boat off the Canadian shore, what part of the river?

A. I was about one-third of the river from the Canadian shore out.

Q. How far above your vessel do you say that collision occurred?

A. The best of my judgment between three and four lengths of the Conemaugh, somewhere about that; about a thousand feet.

Q. Where did it occur with reference to the Canadian side of the river?

A. It was close on the channel bank. I think the Conemaugh was in the mud. I don't know.

Q. You think the Conemaugh was already in the mud at the time of the collision?

A. Yes, sir, I thought so.

Q. Where was the Burlington with reference to your vessel at the time of the collision?

A. She was at Smith's coal dock and a little up the river from me, if anything.

Q. A little up the river and opposite of you?

A. Yes, sir.

Q. And that distance that she was up, are you able to give it, or didn't you notice it carefully enough?

A. Not definitely, no. She might have been about half a length of the dock, I could not tell from that distance.

Q. She might have been a half a length of the dock further above you in the river?

A. Yes, sir.

Q. And to the other side?

A. Yes, sir, I was just about abreast of the lower lights on the dock.

(98):

He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us. I put my wheel hard-a-port, and almost immediately he ported his wheel, or must have, because he had the green light from us.

Q. As the New York was coming at the time you say you think you observed her porting, where would she have gone had she held that course and come right along, when you thought you observed her porting, before you lost her green light?

A. She would have come right through the Amaranth or me; struck us.

Q. You may state whether or not that was your judgment at that time?

A. That was my judgment at that time; she was either going to hit the Amaranth or myself.

Q. How far did she clear you?

A. From 50 to 100 feet, I should judge.

Q. At that time how were you and the Amaranth with reference to each other ; for instance, first, how were you heading as to the Amaranth, when that steamer came up by you ?

A. We were both heading a little diagonally across the river. Probably swinging from the American (Canadian) side of the river from two points about to starboard.

Q. Do you remember how you were heading as to the Amaranth ?

A. We were both heading about the same. I should judge I was astern of her, maybe heading on his quarter. It looked as if we were heading about the same.

Q. And as to the Ferguson and Republic at that time, if there was any difference at all, which of you was over further towards the Canadian shore ?

A. I don't think there was any difference.

Q. When the New York came by you, which way was she heading ; whether directly up or towards the American, or towards the Canadian side ?

A. She appeared to me to be heading a little towards the Canadian side.

Q. Did you observe her as she went up there from that point up to the collision ?

A. Yes, sir.

Q. Did you look out then and see both of them ?

A. Yes, sir.

Q. Can you tell the court anything about the course of the New York after she passed you, whether she wavered to one side or the other ?

A. No, sir, I cannot tell you whether she swung one way or the other.

Q. Now, Captain Smith, what do you think about the speed of the New York ?

A. She was coming very fast, probably ten miles an hour.

Q. Was that boat going up there under a checked speed of four miles an hour ?

A. No, sir, she was not; if she was, it was a very fast four miles.

Q. Now, captain, suppose that the New York, when

she passed you, was under a starboard helm, and as she passed you started to swing to port, where would she have gone with reference to the Conemaugh as you saw the situation?

A. It seems to me she would have went clear of her.
Cross-examination, (101):

Q. How do you arrive at the distance that you say you were from that bank when you say you were one-third of the distance over?

A. By looking at one side and the other side, and seeing that it was twice as far one way as the other.

Q. You had no difficulty in arriving at that?

A. No.

Q. And yet you are absolutely unable to tell me the number of feet you were away from that dock?

A. Certainly I am.

Q. How do you happen to know, if you cannot tell that, that this collision occurred about a thousand feet from you?

A. I judged that from the distance, and the time we run down there.

Q. You saw what was going on, didn't you?

A. I saw the two boats would come together.

Q. And you saw also the water that there was between where you were and the collision?

A. Yes, sir.

Q. And you judged that distance to be a thousand feet?

A. Yes, sir.

(102):

Q. Did the collision occur abreast of the Ferguson?

A. No, sir.

Q. About what direction from the Ferguson did it occur?

A. It was up the river some place.

Q. Off your port quarter?

A. Yes, sir. She was to the port side of the river, further up the river than I was.

Q. And the New York had passed you within fifty feet?

A. Within 50 or 100 feet, I cannot say exactly.

Q. Did you say the collision occurred off your port quarter up the river?

A. It was on the port side of me and up the river.

Q. Was it directly astern of you, or on your port quarter, or abeam of you?

A. It was on my port quarter and astern.

Q. How many points do you think?

A. It bore off between two and three points.

Q. And you say the Conemaugh was virtually on the bank when she struck?

A. I think so; I don't know for a certainty.

Q. From what you saw?

A. That is my opinion of it.

Q. How close did the New York pass the Amaranth?

A. She passed her fully as far from her as she was from me—50 or 100 feet.

Q. She passed you what you would call close, didn't she?

A. Well, you would call 50 feet close with a big boat like that, and us little fellows.

Q. When the Conemaugh was blowing her whistles to the New York she was on your starboard hand astern, wasn't she?

A. Yes, sir.

Q. And when she blew the alarm whistles she had got under your stern?

A. *She was directly astern of me.*

Q. And the collision occurred immediately after that?

A. Shortly after that.

(103):

Q. Do you know whether the New York made any change in her course after she passed the Ferguson, or as she was passing the Ferguson?

A. No, sir.

(104):

Q. As I understand you, it wasn't until she blew the alarm whistles that she got from under your stern?

A. She was passing across my stern.

Q. At the time she blew the alarm whistles?

A. Yes, sir, up the river and astern of me.

Q. About how far was she astern of you?

A. She was about three or four lengths of herself, I should judge.

Q. How fast were you moving at that time?

A. We were moving a little better than two miles an hour. We were with the current, probably a little better than the current.

(105):

Q. Was the Amaranth nearer the Canadian bank as she rounded there than you were?

A. I would not say to that. I don't think she was. If she was it was a very trifle.

Q. As I understand you, the New York passed you when you were about two points off the course up and down the river?

A. Yes, sir.

(107):

Q. What interval was there, if any, between the last two blasts of the Conemaugh and the alarm whistles?

A. Very short.

Q. Can you give us any idea in seconds how long it was?

A. No, sir, I would not pretend to.

Q. Was the interval as short as was the interval between the alarm whistles and the collision?

A. Yes, sir, I would think it was; I would not be positive.

Q. And the collision followed almost immediately on the alarm whistle, didn't it?

A. Very shortly afterwards.

Q. So that the two blasts of the whistle, then almost immediately the alarm, and then almost immediately the collision?

A. A very short space of time.

Q. The time between the last two blasts of the Conemaugh and the collision was a short time?

A. Yes, sir.

Q. So short that there wasn't time to do anything to avoid the collision?

A. I would not say that ; you can do a good deal in a short space of time sometimes.

Q. If there was time enough to avoid a collision, what do you think there was time enough to do to avoid it?

A. I could not say. I should think a man had time enough to roll his wheel over anyway.

Q. That is from the time the last two blasts were blown until the collision occurred?

A. Yes, sir, he would have lots of time to do that.

Q. He would have time enough to put his wheel hard-a-starboard?

A. Yes, sir, either way; a little more than enough to do that, I should judge.

(108):

Q. Did you think there was time enough to get a wheel over?

A. Any ordinary wheel there was, and more time. I could put my wheel over three or four times.

Q. Then yours is an extraordinary wheel?

A. Yes, sir, it is an extraordinary easy wheel to put over.

Q. About how far do you think you moved from the time the last three blasts were given until the collision occurred, how many lengths of your vessel?

A. Oh, I might have moved one length, and I might have moved three, I don't know.

Re-direct examination, Mr. Goulder, (109):

Q. The New York, before you lost her green light there, in the neighborhood of the Amaranth, was showing you, you have stated, all three of her lights?

A. Yes, sir.

Q. And had been showing them for how long a time?

A. It was a short space of time. I would not say exactly. I would not put it into minutes.

Q. And how far in your best judgment was she short of hitting the Amaranth, when you lost her green light?

A. From where I stood it looked to me she was 50 or 60 feet from her.

Q. And went past her that far?

A. Yes, sir.

Q. Now, what was it in your judgment, at the time, which made the New York miss the Amaranth for which you say she had been heading?

A. I thought he ported his wheel.

Q. The New York?

A. Yes, sir.

Q. And if he had not ported his wheel, what would he have done?

A. I thought he would have struck either one or the other of us.

Captain Smith, recalled by Mr. Goulder (182-183):

Q. At the close of your testimony there was said by way of question and answer, about your porting on the Ferguson, and the effect or possible effect of that as to shutting out the green light of the approaching propeller New York, do you remember that subject of your testimony?

A. Yes, sir.

Q. I want you, if you will, to explain to the court, your vessel lying in the position she did under those circumstances, the effect of your putting your helm aport?

Objected to. He said it would swing her bow.

Objection overruled.

Q. What would the effect be as to your stern?

A. Excuse me, if I said her bow, I didn't mean that. It would slew her stern, it would not change the position of her bow.

Q. But changes the direction of the heading of the boat by swinging the stern?

A. Yes, sir.

Q. On this occasion then, as the propeller approached you, describe what the effect of putting your helm aport was, as you testified you did?

A. It would have the effect of throwing me, myself, in view of the green light of the New York, more than I was, if anything.

Q. You were standing where on your boat?

A. I was standing just forward of the cabin on top of the deck load.

Q. You were there in that position when the New York, in the place you described, closed out her green light?

A. Yes, sir.

Cross-examination :

Q. What was your speed?

A. A very little faster than the current, a little over two miles an hour.

Q. What is the current there?

A. About two miles.

Q. What was your speed then?

A. A trifle over two miles.

Q. How much over a trifle?

A. I could not say at all.

Q. You could not say at all?

A. How much over the current?

Q. Yes?

A. No, sir, I can't.

Q. You don't know whether this speed of your's was greater than the current?

A. A trifle.

Q. A half a mile?

A. I don't think so.

Q. Over a quarter of a mile?

A. Between that and nothing.

Kelley, wheelsman, (112-113):

Q. Did you look down that way, and did you see the New York or her lights when your second signal was blown?

A. No, sir, I didn't look down that way at all. The first I saw of the New York was after the alarm signal and we put the wheel hard-a-starboard. After we got the wheel over, I looked down and I saw the New York coming.

Q. When you did that, give us your best judgment of how far the New York was away from you then.

A. Well, she looked to be about two or three boat lengths.

Q. Did you notice anything about her lights?

A. Of course I noticed her lights; I thought she was coming on a steady gait; I kept my eyes on her and shortly after she began swinging to port, and I heard aboard the New York, I heard them hollering, "hard-a-starboard."

Q. How long did it take you that night, when you got that last order hard-a-starboard, to get your wheel over, in your best judgment?

A. Oh, somewhere about 10 or 15 seconds, I should say.

Q. Did any one help you put it over?

A. The second mate.

Q. Which side of the wheel were you standing on?

A. I was standing on the port side.

Q. When you looked down and saw the New York after you had got your wheel hard-a-starboard the last time, did you notice anything of a barge near your boat?

A. No, I didn't notice that at all.

Q. Did you see any such thing as that between you and the New York, or closer to you than the New York?

A. No, I didn't notice the barge at all.

Q. You saw nothing of that kind there?

A. No, sir.

Q. And I understand you to say, correct me if I am wrong, that you had not before noticed the barges, or paid any attention to them?

A. No, I didn't pay any attention to them at all.

Q. Where was the captain during all this time?

A. He was right in front of the pilot house, on the bridge.

Cross-examination (117), (speaking of the Conemaugh):

Q. After you had the order to hard-a-starboard until she was struck, how far did she run?

A. I would not say that at all.

Q. Would she run a length?

A. I don't know; I would not say.

Q. Well, about how far; two or three lengths?

A. Oh, no, nothing like that.

Q. Not two or three lengths?

A. I don't think so, no.

Q. Would she run a length?

A. Well, I would not say how far she would run, but I know she would not run two or three lengths.

Captain Smith, of Wesley (125):

Q. How far above the stern barge in your tow, the Ferguson, did the collision appear to you to take place?

A. Well, I should think it must have been pretty near a thousand feet; the way it looked to me from where I

was. Of course I didn't measure it, but that is what I should judge.

Cross-examination, (128):

Q. How far did it (the collision) occur from where the Amaranth was?

A. Well, it must have been quite a ways from where the Amaranth was I should think.

Q. You could not tell that, either?

A. Not exactly; It was somewheres around 1,500 feet, the way it looked to me.

Merrill, at wheel of Ferguson, (130-131):

Q. How near did the Conemaugh come to your stern at any time?

A. Well, the closest she was, I think, was about four lengths of herself.

Q. How far, Mr. Merrill, in your judgment, if you have formed any judgment on it, was the point of the collision from your boat?

A. About four lengths of herself.

Q. When did you first see the New York?

A. When she was right off our quarter.

Q. Did the deckload prevent you from looking down the river?

A. Yes, sir.

Q. Did you notice how fast the New York was going, or how fast did she appear to be going when you first saw her?

A. I don't know how fast exactly, but she was going at a pretty good rate.

Q. About how fast, can you give us any idea?

A. I don't know as I can tell.

Q. Was she going faster or slower than the Conemaugh was?

A. She was going faster.

Q. How much faster do you think?

A. About twice as fast I should judge.

Q. How was she heading when she came up on your quarter and you saw her first?

A. She was heading right off towards the Canadian shore.

Q. How near, if you noticed, were the two boats to the Canadian shore when they came together. That is, the Conemaugh and the New York?

A. Well, I don't know how near they were, I was paying particular notice of our own boat about that time.

Cross-examination by Mr. Kremer :

Q. The New York passed you close by?

A. Yes, sir.

Q. Within fifty feet?

A. Somewheres around there.

Q. What you call close?

A. Yes, sir.

Q. And you saw her plainly as she passed you?

A. Yes, sir.

Q. At that time you were heading straight up and down the river, or across the river?

A. We started to swing then. I had orders to put the wheel aport.

Q. Had she got abreast of you when you got the order to hard-a-port?

A. No, I got the order before I seen the New York.

Q. The deckload was higher than your boat, wasn't it?

A. Yes, sir.

Q. And you could not see the New York until you could see her from your port quarter?

A. Yes, sir.

Q. Had she lapped the Ferguson when you saw her the first time, had she come abreast of the Ferguson?

A. Yes, sir.

Q. Was the Conemaugh following you any?

A. I think she was, yes, sir.

Q. Following you?

A. Yes, sir.

Q. She didn't get out on your port side until after you saw the New York, did she?

A. I think she was towards the bank about that time I saw the New York.

Q. Was she heading on to the bank?

A. Yes, sir.

Q. Was she heading right straight on the bank?

A. No, she was slanting kind of down.

Q. Was she slanting more on the bank than the New York was?

A. I don't know, they were both heading on the bank.

Q. Can you tell which one was most headed on the bank?

A. I think the New York was most heading on the bank, because I think the Conemaugh was closer to the bank.

By the court (133):

Q. Did you see the collision?

A. Yes, sir.

Q. How far did it occur from the Ferguson?

A. I don't know exactly how far, three or four or five lengths of our boat, I should think.

Q. Which way from you?

A. Right off our stern.

Q. On either side?

A. On the Canadian side.

By Mr. Kremer:

Q. Was it abreast of the Ferguson or over her quarter or over her stern?

A. Over her stern.

Q. Was it directly astern of her, or to one side?

A. I should think it was a little on the Canada side.

Davidson at the wheel of the Wesley, (135):

Q. From where your boat was, looking across the river, will you state whether the tail end of the tow was above or below you at the time of the collision?

A. Above us.

Q. Where was the collision?

A. In regard to the Ferguson?

Q. Yes.

A. She was astern of the Ferguson. The collision was astern of the Ferguson.

Q. About how far do you think?

A. I could not state exactly; the best of my judgment it would be about 800 feet or so.

Hogan, (140-141) :

Q. At the time, when your third signal of two blasts was given you looked out and saw the red light, whereabouts was the New York then? You can give it in distance from your vessel in lengths, or with reference to the tow, if you can tell about the tow?

A. Well, she was somewhere around the third barge.

Q. Somewhere around the third barge?

A. Yes, sir.

Q. At the time of the danger signal were you looking down that way?

A. Yes, sir.

Q. Whereabouts was the New York then?

A. Well, she was coming up on the last one; somewhere abreast of the last barge.

Q. How far below you in the river was the tail of that tow in your best judgment?

A. Oh, she was probably a boat length or a boat and a half; probably 300 feet.

Q. Did you get your helm hard over, hard-a-starboard?

A. Yes, sir.

Q. Did you look out after you had got it hard over?

A. Yes, sir.

Q. And where was the New York then?

A. Well, she was down the river a little ways from us.

Q. How much, what is your impression about it?

A. I guess about a couple of boat lengths.

Q. At the time you looked out, after your helm was hard-a-starboarded, at the time we are talking about, did you notice her colored lights at all?

A. Yes, sir, I saw her red light.

Q. Did you notice any time after that and before she struck you, anything about her colored lights?

A. Well, before she struck us I saw both the lights; she seemed to be coming around on a starboard wheel; I could see both lights just before she struck us.

Q. How much would you say your vessel swung under that final hard-a-starboarding?

A. Probably a point and a half or two points, probably somewhere about that.

(142) :

Q. When the New York struck you, have you any idea how far you were from the bank ?

A. Well, we were not very far. I don't know. I expected to fetch up on the bank before she struck us.

Q. What do you say about whether she did fetch up on the bank before you were struck ?

A. I don't think she did.

Q. How near did you get to it ?

A. Well, we were not over half the length of ourselves away from the bank.

Cross-examination (148-149) :

Q. When you blew the alarm, then you had cut the course of the tail end of the tow and could look down the port side ?

A. Yes, sir.

Q. You saw the red light of the New York ?

A. Yes, sir.

Q. And you could see the distance between the New York and the tail end of the tow ?

A. Oh, I could see they were pretty well off, but I could not make out the distance. At the time of the alarm she was coming probably by the stern barge somewhere.

Q. At the time the alarm was blown the Conemaugh had passed the line of the rear barge's course, and the New York was about abreast of the stern barge ?

A. Yes, sir.

Q. You blew the alarm and put your helm hard-a-starboard ?

A. Yes, sir.

Q. And you swung about a point and a half, you think, before she struck ?

A. Didn't swing as much as that.

Q. How much did you swing ?

A. (Placing models.) That is the position she was in when she struck.

Q. You didn't strike—you didn't swing at all under that hard-a-starboard, did you ?

A. Yes, sir, she swung some.

Q. A point ?

A. Probably that.

Q. About a point?

A. Yes, sir, from that to a point and a half.

Q. She didn't swing six points?

A. No, sir, she didn't swing any more than a point and a half, somewheres in that neighborhood.

Q. And that is the relative position of the boats when they came together, in your judgment?

A. Yes, sir.

Q. She struck right abreast of the barge?

A. Yes, sir, something like that.

Q. She struck you at an angle of seven points, you think, seven points on the starboard bow?

A. Yes, sir, pretty near, call it that.

Q. Did you remain in the pilot-house until she struck you?

A. Yes, sir.

Re-direct examination, (149-150):

Q. When the New York came around the stern of the last barge, if she had had her helm starboard then, and came around there on a swing to starboard, where would she have gone?

A. If she had come around the stern barge she would have went clear, certainly. There was lots of room to go clear, but she didn't appear to come around that way; she went around over toward the Canada shore.

Q. My question is, suppose that after passing the stern barge she had not first gone over towards the Canadian shore and then turned, but had turned up here by the barge, then where would she have gone?

A. She would have went clear then.

Q. And you would have passed each other how?

A. Starboard to.

Q. And you say there was plenty of room for that to have been done if she had turned at that point?

A. I think so.

Q. How far, can you give us any idea, below the tow did the New York turn from the position in which she was showing you both of her lights to this course she took over here which brought her to the Canadian shore under your bow? How far below when she made that change, shut out

her green light from you and took this course that brought her over into the Canadian shore?

A. She appeared to be very close, I could not say just how much.

Q. To which barge? Heading apparently—before he made that change, heading apparently for what barge?

A. Heading on the third barge in the tow.

Q. That is the one we have called the Amaranth here.

A. Yes, sir.

Q. You said you were unable to tell just what the distance was between the New York and the last barge in the tow when she came past her?

A. He appeared to be very close there when he was passing.

Q. Could you see down between them, between the New York and that barge as she came along there?

A. No, sir, I could not, because they were heading in such a direction; I could not see from where I was.

Q. What do you say about the room here between the last barge in the tow and the Canadian shore, as to whether there was room for those boats to navigate, if they had been properly handled?

A. I certainly think there was room enough for them to pass.

Q. And about the room that was between you as you came along here and this stern barge, what do you say about there being room there for a propeller to navigate in safety between you and that barge?

A. Yes, sir, there was. The barge was pretty well off us.

Q. To your starboard?

A. Yes, sir.

(151):

A. There was room enough to come around. They could have come around between us and that second schooner. I think there was plenty of room.

Q. Then why didn't she go clear?

A. Because he didn't come around in time enough.

Q. Because the New York didn't come around in time enough?

A. Yes, sir.

Cross-examination, (152-153):

Q. Now, you say to Mr. Goulder there was room enough between the tail end barge of that tow and the New York, when the New York came by her, for the New York to have starboarded and run in close under her stern, closer than she did? You stated that, did you?

A. Yes, sir.

Q. How far from that barge, in your judgment, did the New York pass?

A. Passed up around the stern, or do you mean when she was going across the river?

Q. Passed around the stern.

A. Well, she passed from three to four boat lengths of the Conemaugh, that is, after she came up the river.

Q. Just think of that again and tell me once more how far the New York passed from that stern barge?

A. Just after she comes around there a little?

Q. (Placing models.) The stern barge is in its proper place. Tell me how far she passed, please, from that stern barge? You may take the model and place it wherever your good judgment thinks it was. The stern barge was heading down stream, wasn't she?

A. Well, she was heading more over.

Q. We will make her head more over then. Make her head any way you like. Now, show us how the New York came up?

A. She came up in that direction. (Moving models).

Q. Now, right there, how far was she in your judgment from that stern barge?

A. Well, she could not have been more than 100 or 200 feet anyway. Somewhere in that vicinity. She was very close.

Q. She was very close to that rear barge?

A. Yes, sir.

Q. Now, you say she could have sooner have starboarded and run under the stern of that barge and cleared the Conemaugh. What do you mean by that?

A. I don't think she got her wheel over hard-a-starboard when she did come around.

Q. Where do you think she ought to have put her wheel over?

A. When she came to his quarter she could have come around that way, under the starboard wheel.

Q. He could have starboarded or started his starboard helm when on the quarter or beam or abreast of that stern barge?

A. When he was on the quarter.

Q. And that would have given her a swing to port around the stern of the barge?

A. Yes, sir.

Q. Now, she was on a swing to port when she struck you?

A. Yes, sir.

Q. And she struck you about 300 feet above that stern barge?

A. Above, yes, but this stern barge was away out in the river.

Q. The stern barge was away out in the river?

A. Yes, sir, we were in here, nearer the shore.

Q. Can you get the boats in that position without putting the helm of the New York hard-a-port and swinging her around over and then putting it hard-a-starboard and swinging back again?

A. No.

Q. Where were the boats when they came together, I mean the Conemaugh and the New York. Where were they with reference to these boats now?

A. (Placing models.) In that position.

Q. Now, the distance between the stern of the New York and the last barge of the tow is less than 100 feet, you say, the lateral distance?

A. I am a little mixed on these boats. The New York was above the tow.

Q. Do you think you have reached it now as you want it?

A. Yes, sir.

Q. And the distance from the collision to the (stern) steam-barge of that tow is about 300 feet, as you say, or you have said it two or three times?

A. What I said was that we were 300 feet above, not right above, up this way.

Q. When the collision took place?

A. I mean to say this boat was out in the river, she left a good space to go up here, but she was out from the bank here. That was the 300 feet I had reference to. It was the 300 feet we were above the tow, about.

Q. The Conemaugh was 300 feet above the tow when the New York struck her?

A. Yes, sir, above, but not in distance.

Q. And the New York came up within 100 feet of that barge?

A. Somewheres in that neighborhood.

Q. And she was swinging under a starboard helm when she struck you?

A. Yes, sir.

Re-direct examination by Mr. Goulder (153):

Q. Have you any idea how far this tow was, the last of the tow, below the New York when the New York struck you?

A. I have, she was pretty well astern of the New York.

Q. Pretty well astern of the New York at that time?

A. Yes, sir, she was more than what the model shows.

Q. Put it down as it looked to you?

A. I should say she was anyway two boat lengths past the barge.

Q. That the New York was two boat lengths at least past the last barge when the New York struck you?

A. Yes, sir.

Q. And the barge well out in the stream from the place where the New York hit you?

Re-cross examination by Mr. Wisner:

Q. What boat do you refer to when you say two boat lengths?

A. The Conemaugh.

Q. The Conemaugh is 250 feet long, isn't she?

A. Yes, sir, somewheres about that.

Q. And you say the stern barge of the tow was at the time of the collision two of those boat lengths from the Conemaugh at the time of the collision, do you say that, or from the New York?

A. Below the New York.

Q. You have then stated four times she was 300 feet from the Conemaugh—

Mr. Goulder: No, he has not stated that. He has especially corrected you.

A. I said 300 feet down the river, but this time when we put our wheel starboard that she was 300 feet down the river, but still she was out in the river; I do not mean to say she was 300 feet from the Conemaugh.

Q. Whom do you mean by she?

A. This stern barge.

Q. What distance do you mean to testify when you say she was 300 feet below you?

A. This barge was 300 feet below us when we put our wheel starboard.

Q. Where was the New York then?

A. She was somewhere near abreast of that barge.

Q. Abreast of that barge and 300 feet below you?

A. Yes, sir.

Q. And within 100 feet of her?

A. Yes, sir.

Q. You put your helm hard-a-starboard, then swung a point or a point and a half at the very most, the New York came up with her helm hard-a-starboard, swinging to port and struck you?

A. I don't know as it was hard-a-starboard, but she was swinging very fast when she came where I could see her.

Q. She was swinging as though her helm was hard-a-starboard?

A. Yes, sir, when she got close enough to me to see her.

May, (156):

Q. At the time of the alarm whistle, as it appeared to you, was he nearer the Canadian shore, the tail of the tow, or the vessel you were on?

A. I think the Conemaugh was a little bit nearer the Canadian shore.

Q. In your best judgment and estimate, how far below you in the stream was the tail of the tow at that time, or about that time?

A. Well, it might have been two or four lengths of the Conemaugh.

Q. Between the tail of that tow and the Canadian shore what space was there?

A. I guess pretty near four lengths of the Conemaugh, that is what I mean.

Q. Did you at that time see the New York and notice her so you can tell us anything about where she was at the time of the alarm signal?

A. Yes, sir, she was some place between the last barges.

Q. Somewhere along in there?

A. Yes, sir.

Lawson, cross-examined, (163):

Q. And it arises in your own mind that the distance between the last barge of the tow and the Conemaugh at the time of that collision was two or three lengths of the Conemaugh?

A. Yes, sir, I should judge it was that.

Crowe, (175):

Q. Now, take it at the time of the alarm whistle. Are you able to state, and if so, you may state, as it appeared to you, which was closer to the Canadian shore, your vessel, or the tail end of the tow?

A. I think the Conemaugh was.

Q. And in your best judgment, how far down the river below you was that tail of the tow, that last barge?

A. I should think between three and four lengths of the Conemaugh.

Q. And what do you say as to the distance she appeared to be out from the Canadian shore at that time?

A. I don't know. I don't think it was half way in the middle in the river. She was over a quarter of the way out from the Canadian shore.

Q. At that time of blowing the alarm whistle, state if you can, where the New York was, or where she seemed to be?

A. Well, she was somewheres around the last barge of the tow.

Cross-examination, (176):

Q. Had the Conemaugh passed by the barge at that time?

A. How do you mean?

Q. Passed the stern of her?

A. Yes, sir, I think she did.

Q. That was at the time the alarm whistles were blown?

A. Yes, sir.

Q. Had the whole of the Conemaugh got passed the stern barge at that time?

A. I didn't notice.

Q. Which way did you look to see the stern barge?

A. Well, I looked a little towards—right about abreast of me, I think, maybe a little back.

Q. A little forward, didn't you?

A. Maybe a little astern.

Q. And at that time the New York had not passed the stern barge?

A. I could not say whether she was past her. She was somewheres close around her anyway.

Verrault, on Smith's coal dock, (191):

I heard two blasts two or three times and several short whistles. I saw the New York coming up over a mile below when the Conemaugh first blew to her. I heard no engine signal. New York was coming pretty lively, between eight and ten miles per hour. Usual course for down boats past dock to go on Canadian shore. Bound up boats most of them go on American shore. Saw Conemaugh's colored and white lights; they were brightly burning. Collision about three lengths of Conemaugh above end of tow.

Johnson, (192):

On coal dock with Oscar Lawson at time of collision. Conemaugh blew check whistle and headed for Canadian shore. She blew three signals of two blasts to the New York, after that I heard a few short whistles. No answers from New York. Saw New York's red and bright lights. *I watched her, but lost track of her light as she turned towards*

the Canadian shore. New York near second or third barge when I lost red light. Nothing there to hide it. I saw red light again just before collision. New York coming pretty fast. I heard no engine signal on New York. Collision was about five lengths of Conemaugh above last barge in tow.

The following witnesses from the coal dock say the New York's red light disappeared just before she got up to the Amaranth.

Lawson, (160),

says it disappeared and then he saw it again just before the collision.

Mrs Linderman, (165).

Johnson, (192).

H. P. Linderman, (169).

A Just as she commenced to turn where she came up the river and got pretty near the barge, she commenced to swing over to the Canadian shore and I lost her red light.

Q. At the time you lost that red light, was she below the tow a little or a little above it, or right up to it?

A. She was about two lengths below the tow.

Q. What caused you to lose that red light, if you know?

A. When she commenced to turn.

Q. Was there anything there, if she didn't turn, if you saw, to prevent you from seeing the red light?

A. There wasn't anything.

Q. Did you see the red light again at any time?

A. Yes, sir, just before the collision.

Q. How fast was the New York going, in your judgment?

A. About nine miles an hour.

Q. How long have you been on that dock?

A. Two summers.

Q. Have you noticed the usual course of boats bound up and down the river at that point?

A. I have.

Q. Which side of mid-channel is usually used by steamers going down?

A. Going down most generally they take the Canadian side; most always.

We submit that the foregoing testimony clearly demonstrates the justice of charging the New York with the three faults heretofore stated, and further, on this testimony:

4. We charge fault in the New York in that if for any reason it was necessary for her to make a change of course to clear the tow, she did not resume her course as soon as the obstruction was cleared, but continued on the new course across the channel and into the Conemaugh.

5. In that she did not even maintain this last course across the channel, but that just immediately preceding the collision she swung slightly under a starboard helm so as to strike the Conemaugh on her bow.

On this last charge of fault, some of the witnesses testify emphatically (and are not contradicted), that just as the New York was striking the Conemaugh, she swung some to port; others, including Captain Miller, testify that they thought that they noticed this later movement on the part of the New York, but will not be positive.

We concede that Captain Miller would not swear positively that at the time of shutting out the green light, when he blew the alarm, that the New York made any greater change in her course, that is, *turned at any broader angle*, than the position in which she had put herself, with respect to the tow, made necessary.

We concede, further, that he would not be positive that the New York was under a starboard helm when she struck the Conemaugh, but this we apprehend to be immaterial,

and we do not see how it may be material to the court whether the New York ran straight for the tail barges of the tow until *she had to turn off broadly from them, or whether she turned at a greater or less angle than the position in which she put herself required, since it is conclusively shown and we challenge counsel to find any contradiction whatever in the record of the fact, that she did make the turn there.* Further, we cannot see how it is material to the court to find whether, after making this turn and deviating from her course, she went in a straight line to where the collision occurred, on the Canadian channel bank, or whether she made another turn after that, when colliding under a starboard helm, as, in the latter event, it could only add one more charge to her faulty navigation, for which, under any event, she must be condemned. *Beyond contradiction she is shown to have deviated, whether in a straight line or otherwise, five or six hundred feet to the eastward of any deviation made necessary by the presence of the tow.*

With the case of the John L. Hasbrouck, 93 U. S., 405-410 as a precedent, the District Court held that:

"It was her duty to starboard and resume her course as soon as possible, having regard to the exigencies of the situation." And further says, "There was ample room for her to have obeyed these requirements, which would have taken her under the stern of the Conemaugh. The master of the Conemaugh had a right to expect this plain duty would have been performed, for his vessel had then crossed the proper path of the New York. A fitter case for the exercise of disciplinary power committed to the inspectors of steam vessels than that afforded by the navigation of the New York can scarcely be imagined. Revocation of the license of her master or an extended period of suspension, would have a salutary

effect in promoting the safety of life and property on the lakes. The case of the New York is without the shadow of a defense." 53 Fed. p. 556.

With the vessels in the position they were at the time this third signal was blown, and in the light of after events which have proven that the New York went to the Canadian channel bank, we concede that the Conemaugh would have cleared the New York if she had early ported and swung down on the port hand of the New York and next to the tow. But to argue that he should have done so is unfair criticism, because the conceded proper course of the New York was next to the tow, and not where she actually went. *The law gave the Conemaugh the right, and imposed on her the duty, to expect the New York to go, not where she actually went, but precisely where counsel argues that the Conemaugh should have gone.* In other words, it is argued that the master of the Conemaugh should have known that the New York would take a course directly opposite to what the law says she should take. It charges him with the duty of knowing that the New York, privileged to deviate only so far as was necessary to clear the tow, would continue her deviation beyond that point. If he had ported and taken the course which the law gave to the New York, and if the latter had performed her legal duty and made no greater deviation than was necessary to avoid the tow, there must have been a collision, for which the Conemaugh would have been responsible. We contend that the criticism is unjust, and that it was not the legal duty of the Conemaugh to port and go into the rightful course of the New York, but that the courses of both were then irretrievably fixed

and determined by law, and the Conemaugh had no right to turn into, down or upon the course which belonged to the New York, and which was next to the tow. On the other hand, her sole duty was to avoid and keep out of the course which belonged to the New York, and the collision occurring where it did, shows that she fulfilled her duty in that regard. The whole argument of port hand being proper for the Conemaugh is based upon facts disclosed by the collision, from which it is learned that the New York did leave an opening on her port hand, after passing the tow, through wrongfully leaving her course, and is just such criticism as is condemned in the *Nevada*, 106 U. S. 154.

We contend that under the established principle of law that the crew of a vessel know best what was actually done on board their own vessel, the respondent has withheld the best proof of the facts as it claims them, and is certainly entitled to have no doubtful fact resolved in its favor.

If the New York had been in charge of a competent and attentive master, there was nothing more dangerous in the situation than is attendant upon the ordinary and daily navigation of the channels connecting our Great Lakes up to the time that the New York changed her course close to the tail end of the tow, and then there was danger, conditioned only, upon her unnecessarily, negligently and unlawfully maintaining this changed course.

As Captain Miller conceded in his examination, a change may have been necessary, and the initial change may or may not have been more than was then required. The New York would be expected to maintain that change only

as necessity required, but the captain of the Conemaugh took the precaution of blowing an alarm and starboarding to give the New York more room. At this time, there is nothing but clear water between the Conemaugh and New York, and yet the answer concedes that the Conemaugh was not seen until she blew this alarm.

From the above testimony it is clear that then the New York recognized the situation as one for the use of the starboard helm, and starboarded, but too late. (See answer which bears out above testimony as to this last movement (10).

Speaking of the time the Conemaugh blew the alarm, the answer says: "*A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done.*"

While the answer thus confirms our claim that the New York was swinging to port at collision, it goes further and, while disputing the libelants' claim as to distance between the vessels at this time, affirms the propriety of the Conemaugh's keeping on over toward the Canadian shore, instead of reversing, as it asserts that the New York's only hope of avoiding collision was in her starboarding, and thus turning *toward* the course *away* from which the Conemaugh was going.

With the tow so far from the Canadian bank and the collision so close to that bank, and the added fact that the New York did not see the Conemaugh until the collision was inevitable, there would seem to be sufficient data to

account for this collision. With the tow close on the port hand of the proper course of the New York, and with a channel several hundred feet in width on the starboard hand of this proper and intended course of the New York, and with the collision occurring near the Canadian shore and a long distance on the New York's starboard hand from the tow, it seems that the same conclusion should be reached in this case as was reached in that of *The Transfer* No. 4, 44 Fed. Rep. 304, which is almost parallel.

The reasons for condemnation in the case of the *John King*, cited below by respondent, are stated as follows :

"She had concluded previously to pass across the bow of the ferry boat, but had received no consent from the ferry boat to such a course, and there was still time to abandon that purpose and go astern. *The latter course was plainly safe, the former doubtful*; and, quite irrespective of any rule of the supervising inspectors, *common prudence* required her to adopt the *safe course* and pass astern."

In that case, therefore, there was doubt of the ability to cross the bows (the contrary appearing in this case), and there was no obstruction to prevent the boat passing under a port helm, and further than that, the boats were there in such a situation that the red light of one was opposed to the green light of the other. We are of opinion, however, that while the *John King* case is not parallel with the one at bar, it nevertheless exonerates the *Conemaugh* *for not having stopped and reversed*, in the following words, to-wit :

"But there was still an interval, during which the ferry boat had a right to expect that the propeller would make a proper maneuver to avoid her; and, as she could not know that the propeller would not alter her course to starboard, it would have been as peril-

ous for the ferry boat to stop and back as to proceed. We think that she properly delayed stopping and backing until it became obvious that the propeller was not going to clear her, and, in the short intervening distance, this was not obvious until the propeller gave the alarm signals, and then the ferry boat did all that she could. *The case is one for the application of the rule that a vessel which is primarily in fault for a collision cannot shift its consequence in part upon the other vessel, without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster.*" 48 Fed. 474.

We submit that the facts and law condemn the New York as solely at fault for the collision.

Respectfully,

HARVEY D. GOULDER, and

JOHN C. SHAW,

Proctors for the Conemaugh.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

THE ERIE AND WESTERN TRANSPORTATION COMPANY, and
THE BRITISH AND FOREIGN INSURANCE COMPANY (Limited),
THE INSURANCE COMPANY OF NORTH AMERICA,
THE UNION MARINE INSURANCE COMPANY, and
THE MARINE INSURANCE COMPANY (Limited),

Petitioners,

vs.

THE UNION STEAMBOAT COMPANY. Claimant of the Propeller
"New York."

No. 277.

BRIEF FOR THE UNDERWRITERS ON THE CARGO OF THE PROPELLER "CONEMAUGH".

The original libel in this cause was filed by the Erie & Western Transportation Company, owner of the propeller Conemaugh, in behalf of itself as such owner, and also as trustee for the owners of the cargo with which the Conemaugh was laden at the time of the collision.

The damages resulting from the collision to the hull of the Conemaugh were more than \$20,000; the damage to the cargo was about \$30,000, and the salvage expenses

made necessary by the collision amounted to about \$10,000; total, \$69,978.91.

The several insurance companies above named were underwriters on the cargo, to whom it was abandoned subsequent to the collision; who, having paid the owners thereof as for a total loss, became thereby subrogated to all the rights of the owners of the cargo. After the cause was at issue, these several insurance companies, by an order of the Court, were permitted to intervene for their respective interests.

The District Court held the New York wholly in fault for the collision, and decreed, among other things, that her owner should pay the entire loss to the cargo as well as to the hull of the Conemaugh. The Circuit Court of Appeals reversed this decree. The underwriters united with the owner of the Conemaugh in the petition for certiorari by which the cause was removed from the Circuit Court of Appeals into this Court. As owners of the cargo by virtue of the abandonment, the interests of the underwriters are independent of those of the owners of the Conemaugh, although both are interested in having the New York condemned for the collision.

A full statement of the facts of the case is contained in the brief of counsel for the owner of the Conemaugh, and need not be repeated here.

ASSIGNMENT OF ERRORS.

It is submitted that the Circuit Court of Appeals erred

1. In not holding that the propeller New York was in fault;

- (a) For want of a proper and sufficient lookout.

- (b) For not checking her speed or stopping after it was evident that the two steamers were approaching each other so as to involve risk of collision.

(c) For not properly holding her course, she being on the starboard side of the Conemaugh, and the steamers being on crossing courses so as to involve risk of collision.

(d) For not paying attention to or answering the signals of the Conemaugh, thereby violating Rules I., II., III., prescribed by the Supervising Inspectors.

2. For not holding that the New York was liable for the entire amount of the damages resulting to the cargo of the Conemaugh, even if both the Conemaugh and the New York were in fault for the collision.

3. In not affirming, as to the underwriters, the decree of the District Court which awarded to them their entire claim for the loss of the Conemaugh's cargo, against the New York.

We shall not argue in this brief that the Conemaugh was faultless, but leave her case with the advocates of the original libellant. We submit, however, in view of the many gross and glaring faults on the part of the New York, and the absence of all ordinary care and vigilance on the part of her navigators, that the Conemaugh ought not to be condemned upon merely technical grounds, or in the absence of clear and convincing proof of some fault on her part which was the proximate cause of the collision.

Upon the facts disclosed by the record and upon the findings stated in the opinion of the Circuit Court of Appeals the New York should be held in fault in several particulars,

1. For not maintaining a proper and sufficient lookout.

2. For not checking her speed or stopping after it was evident that the two steamers were approaching each other so as to involve risk of collision.

3. For not properly holding her course, she being on the starboard side of the Conemaugh, and the steamers being on crossing courses involving risk of collision.

Rules 19 and 23 Rev. Stat., Sec. 2233.

4. For not paying attention to, or answering the signals of the Conemaugh, thereby violating pilot rules II., III. and VI., prescribed by the supervising inspectors.

I.

THE NEW YORK WAS GROSSLY IN FAULT FOR NOT MAINTAINING A PROPER AND SUFFICIENT LOOK-OUT.

The fact that the New York did not maintain such a lookout is clearly established by the admissions contained in her answer and in her cross libel. It was a clear, starlight night. There was no fog or mist to obscure or render navigation difficult. Objects on one side of the river were visible to persons on the other side. A vessel, if without lights, could be seen at a distance of a least half a mile.

CAPTAIN POWRIE, the master of the Burlington, testifies as follows (Rec., 67):

Q. What was the condition of the atmosphere at that time?

A. I think it was starlight overhead, a clear, dark night. The moon hadn't come up; there was a little smoke up around town. There was some in the river; not a great deal.

* * * * *

Q. You stated in your direct examination that you watched the Conemaugh very closely when you signaled her two whistles?

A. Yes, sir, I did.

Q. It was dark; you could not see anything of [but] her lights, could you?

A. No; I could make out she was a steamer.

Q. Of course the masthead and side lights would indicate that to you?

A. Yes, sir.

Q. You could not see the body of the boat swing in the water, could you?

A. Oh, yes; we could see the boat's hull plain enough to know that it was a boat all right; we could not distinguish a man walking on the deck, or what color she was painted; and putting her wheel hard astarboard, as I judge she did, she came around there mighty lively by the shape of her colored lights.

Q. You told that by the lights?

A. Well, not exactly. By the lights *and the boat, too.*

Q. It was light enough so you see the boat turn around?

A. Yes, sir.

Q. * * * It was so light you could see the [her] athwartships of the stream standing off the Canadian shore?

A. Yes, sir.

Q. You didn't hear her checking whistle, but you saw her check?

A. Well, I believe I stated that; I would not take my oath that I heard the whistle, still I felt pretty certain I heard it; at any rate I saw the boat slack her speed.

Q. What did you see that led you to believe she was checked?

A. I saw the boat go slower.

Q. You noticed a difference in her speed?

A. I certainly did; no mistake about that.

. . .

Q. I want to know what you saw that indicated to you that the boat had slacked up its speed that night after the boats were out of your sight?

A. You want to know what I saw that made me think the boat slacked her speed?

Q. Yes, sir.

A. I have already said I saw the hull of the boat, not to distinguish anything aboard of her, but enough to tell it was a boat's hull and that she was going down the river pretty lively; so lively I thought she had made the turn over towards Canada.

. . .

Q. From where you were could you see the barges plainly?

A. Not very plainly.

Q. Could you see the Conemaugh plainly?

A. Not plainly, no, sir; it was a boat, and what she was doing; that, together with my knowledge of the whistles, and I saw the man put his wheel to starboard and it made me know what she was about.

Rec., pp. 68, 69, 70, 71.

Captain Powrie is a disinterested witness. His testimony is entitled to credit. The respondent's witnesses were in court and heard him testify. They could have been called to contradict him if what he testified to was not true. He is corroborated by other witnesses, and it is fully shown that there was nothing to prevent the men on the New York from seeing the Conemaugh, her hull as well as her lights, or from hearing her signals, and from seeing what was her course and the danger which the vessels were running into. The fact that they did

not hear the signals of the Conemaugh nor see that vessel herself, nor see her lights, is admitted by the answer and is sufficient to establish the fact that no proper lookout was maintained on the New York, or that her officers were entirely reckless in the navigation of their vessel. The language of the District Judge, who heard the witnesses testify, and which I here quote, must commend itself to this court:

"The admitted facts that her officers did not even "hear the first two signals of the Conemaugh, and, "though their attention was challenged to her by "her third whistle, did not see her until the alarm "whistles were sounded when the vessels were "scarcely a quarter of a mile apart, although the "weather was favorable to sight and hearing, and the "conditions of the locality called for careful navigation, are conclusive that her master, and lookout, if she had one, were either incompetent or "grossly negligent of their duties. If her lookout "saw and reported the lights of the Conemaugh, "his exoneration makes the conduct of the master "or other officer of the deck in disregarding that "warning, more reprehensible. The Conemaugh's "whistle was loud and coarse, and her lights lawfully placed and burning. Nothing can palliate "the negligence which failed to notice either. If "the master was at his post or giving attention to "his duties, he should have heard or seen the descending steamer despite the negligence or even "the want of a lookout; for the lights were seen and "the signals heard by the crews of the Burlington "and her barges, and by persons at the coal dock, "who were at a greater distance from the Conemaugh than the New York."

53 Fed., 553.

Under the circumstances, the New York was fairly called upon to explain why she did not see the Conemaugh's lights or hear her signals. The men who com-

posed her watch were present at the trial in the District Court. They heard the testimony on the part of the Conemaugh. They knew what was charged against them. They knew, and the counsel who represented the owners of the New York must have known whether the signals and lights of the Conemaugh were disregarded, or whether they did not hear the one or see the other. And we submit *that the withholding of the testimony of the officers and crew of the New York, under the circumstances, creates a presumption that, had these men been permitted to testify, their testimony would have shown that the New York was in fault for the collision.*

The respondent was called upon by the strongest consideration, if innocent of fault for this collision, to bring to the support of its defense the evidence that it had under its control. It is well settled "that to withhold testimony which is within the power of the party to produce, to rebut a charge made against him, is to be regarded as fatal as positive testimony in support of the confirmation of the charge"

Clifton vs. U. S., 4 How., 422-426.

Gulf, Sea & S. F. Ry. Co. vs. Ellis, 54 Fed., 48.

The withholding of the testimony of the officers and crew of the New York, under the circumstances, should be regarded as a *confession of fault* on the part of the New York, for which she should be condemned.

The general rule which requires parties to present in courts of justice the best evidence in their power, makes every intendment against them when such evidence is withheld.

Wolf vs. The Vanderland, 18 Fed., 726.

In cases of collision, the solution of which is doubtful because of conflicting testimony, if it appear that an im-

portant witness is not called, the doubt will be resolved against the vessel on which he was engaged.

The Fred M. Laurence, 15 Fed., 635.

"A party being apprised of evidence and having the means of explanation in his power, and does not make it, the strongest presumption arises that the charge or claim is well founded. It will be contrary to all experience of human nature and conduct to come to any other conclusion."

Starkie on Evidence, 817.

We submit that it is impossible to avoid the conclusion that there was either such a want of a proper lookout, or such recklessness on the part of the persons navigating the New York, as caused or contributed to the disaster; and therefore the New York should be held in fault.

The rule which requires a proper lookout to be kept is so familiar and is of such universal application that it requires little argument to support it in this case. It was a part of the common law of the sea before it was declared by legislative enactment. It is a rule of good sense and common precaution. Its existence was recognized and the duty which it creates was formulated by Art. 20 of the Sailing Rules of 1864, which declares that,

"Nothing in these rules shall exonerate any ship or the owner or master thereof from the consequences of any neglect to carry lights or signals, or any neglect to keep a lookout, or neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

The duty to maintain a lookout and to use every precaution in the navigation of a steamer upon a great thoroughfare of commerce like the Detroit River, is a *legal*

duty, as binding and as imperative as any regulation prescribed by legislative enactment.

MARSDEN ON COLLISIONS, 495, speaking of Art. 20, says:

"It seems difficult to attribute to it any legal effect. It was inserted in the regulations probably *ex abundante cautela*, and as a declaration, not to be overlooked by seamen, of the legal consequences of negligence."

The Elizabeth Jones, 112 U. S., 514-523.

The Farragut, 10 Wal., 334.

The Sunnyside, 91 U. S., 208.

The Schmidt and the Reading, 43 Fed., 815.

The Agnes Manning, 44 Fed., 110.

The Nessmore, 50 Fed., 616.

The neglect to maintain a proper lookout, under the circumstances, was the omission of a *legal duty* on the part of the New York and brings her within the familiar rule that "the omission of a known legal duty is such strong evidence of carelessness that the offending vessel must be held altogether in fault, unless clear and indisputable evidence establishes the contrary."

Taylor vs. Harwood, Taney Decisions. 444.

The rule with respect to lookout having been violated by the New York, she must be held to have been in fault, unless it be established by clear proof, not only that the violation of the rule probably did not, but that it *could not have contributed to the collision*.

The Richelieu Nav. Co. vs. Boston Mar. Ins. Co.,
136 U. S., 408.

The Pennsylvania, 19 Wall., 125.

The fault of the New York was not merely of a technical character. It was an actual fault, which clearly con-

tributed to the collision. This appears when we consider the relative positions of the Conemaugh and the New York, and the Burlington and her tow at the time the various signals were given. The Burlington had rounded to so as to exhibit her green light to the Conemaugh. Her tow stretched across the river in a circular shape with a narrow channel between the stern barges and the Canadian shore, which the Circuit Court of Appeals found was only about 500 feet wide. (Rec., p. 279.) The Conemaugh was then about three-quarters of a mile above the Burlington and was showing both of her lights to the Burlington. While they were in that position, the Burlington sounded two distinct blasts of her whistle to the Conemaugh, indicating that she should pass not only to the starboard of the Burlington, but to the starboard of her tow as well. In other words, that she should pass between the barges and the Canadian shore. To this signal the Conemaugh responded with two blasts and thereby entered into "a proper" agreement and understanding with the Burlington that she would pass between the barges and the Canadian shore; and in accordance with these signals and agreement, she starboarded her wheel with the purpose and intention of directing her course accordingly.

The New York was much nearer to the Burlington when the latter signaled the Conemaugh, than she was when the signals were exchanged between herself and the Burlington, and the watch of the New York knew, or ought to have known, from those signals, that the Conemaugh would pass the tow in accordance with her signals, and would direct her course to the "narrow strip" or channel between the barges and the Canadian shore. If there was any room for doubt that such would be the course of the Conemaugh, that doubt ought to have vanished when the Conemaugh starboarded, and when she

sounded her signal of two blasts to the New York. And the men on the New York, if they had not been negligent, could easily have seen that such was the Conemaugh's course, and that she intended to pass down between the barges and the shore. As the two steamers were on crossing or "slanting" courses it was evidently a dangerous thing for them to attempt to meet and pass in the narrow channel between the barges and the Canadian shore, and it was the duty of the New York to exercise the greatest care and vigilance under the circumstances. It may indeed be argued that as she heard this bargain made between the Conemaugh and the Burlington, and as she saw, or ought to have seen, the Conemaugh shape her course for the purpose of passing the barges in accordance with the bargain, she ought not only to have anticipated the probability of collision, but that as the Conemaugh was the descending vessel, she would have the right of way through this narrow channel, and that it was the duty of the New York to have checked or stopped, or have taken some other means to keep out of the way of the Conemaugh. And it may also be claimed, that having heard the signals exchanged between the Burlington and the Conemaugh, and having seen the Conemaugh shape her course in accordance therewith, the New York is to be considered as assenting to the arrangement thus made, and that she is estopped to insist that the Conemaugh was in fault for taking the course which she did take.

It is no answer for the appellant to say that the New York had the right of way, and that the Conemaugh was pursuing a dangerous course which was likely to involve the steamers in collision; for if this be true the New York was bound to guard against the impending disaster by every possible means within her power. It must have been evident to the men on the New York, if they were

not grossly negligent of their duty, that the vessels could not shape their courses for the Canadian shore and attempt to pass each other in this "narrow strip" or channel, between the shore and the barges, or between the shore and the course of the barges, without danger of colliding.

As we have already stated, the movements of the Conemaugh were visible to Powerie, the captain of the Burlington, who says he could see the hull of the boat and the course which she was pursuing, and could tell when she checked her speed.

Rec., pp. 68, 69, 70, 72, 75, 77.

See also the

Testimony of Harry P. Linderman, l' 6, 198.

Dory Linderman, 166, 168.

if the channel between the tow and the shore was on

As suggested, the men on the New York ought to have known that the two steamers were likely to meet in a dangerous place. They ought to have known that the course of the Conemaugh would take her across the bows of the New York. For the New York to continue on her course with unabated speed, reckless of the impending danger, without a lookout, without giving or answering a signal, and without making any effort whatever to avoid a collision until all efforts were useless, shows that she was guilty to a degree which was gross and criminal.

If we concede that the New York had the right of way, this would not relieve her of the duty to maintain a lookout. The right of a vessel to keep her course under Rule 23 does not dispense with this obligation.

But for the presence of the Burlington and her tow the case might have fallen directly under Rule 19, but it may be well claimed that the presence of the Burlington and her tow, together with the fact that the Conemaugh was the descending vessel, was a *special circumstance* which

modifies what would otherwise have been the rights and the duties of the New York and the Conemaugh, by bringing the case within Rule 24, which declares that:

"In construing and obeying these rules, due regard must be had to any special circumstance which may exist in any particular case, rendering a departure from them necessary to avoid immediate danger."

It will be observed that the right of the New York to keep her course under Rule 23 is expressly declared to be "subject to the qualifications of Rule 24." If we adopt in favor of the New York the most favorable view which can be taken of the testimony, it is evident that these steamers were not only "crossing so as to involve risk of collision," but that they were *approaching* each other so as to involve the risk of collision, and that it was the imperative duty of both to slacken speed, and if necessary stop and reverse. The New York, therefore, was guilty of a direct violation of Rule 21; and even if we concede that she had the right of way, and that it was primarily the duty of the Conemaugh to keep out of the way, the New York was also guilty of a violation of Rule 24.

MARSDEN ON COLLISIONS, 475. says:

"The rule that a ship is to keep her course does not mean that she is to do so obstinately when she sees that, under the peculiar circumstances of the case she can, by departing from it, avoid a collision."

At page 485 it is said:

"Not only is departure from the rule of the road excused by Art. 23, where the rule cannot be obeyed without a collision, but a literal observance of the regulations cannot be set up as a defense where the collision might have been avoided by ordinary care. When one person neglects his duty, and so puts another into danger, the second is not

justified in doing nothing to avert that danger, though it is caused entirely by the fault of the first. You may depart, and you must depart from a rule, if you see with perfect clearness, almost amounting to certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it; and, indeed, this is provided for by the 19th Art."

The right of a steamer having another on her port side, their respective courses being converging or crossing, to keep her course, is no greater than the right of a sailing vessel to keep her course when meeting a steamer. Yet in the *Sunnyside*, 91 U. S., 208, a bark was held in fault for a collision with a steam-tug which had full steam on, and which was exhibiting the colored lights of a steamer in motion, although the bark kept steadily on her course until the collision was inevitable. In that case, when the tug was about two miles distant, the lookout of the bark discovered and reported her lights to the mate, who came forward and observed them, and seeing that it was a steamer supposed she would take care of herself, and then returned aft to look after other lights. No further observation or report of the tug was made until just before the collision. The court say:

"Indifference in respect to an approaching light such as was manifested by the mate was not calculated to induce much vigilance on the part of the lookout. * * * Negligence more manifest, culpable or indefensible in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the eighteenth sailing rule provides, that where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of naviga-

tion and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger."

"Years before the Act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collisions, and to save life and property at sea, and not to promote disasters; and decided that the neglect of one of two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent collision as the circumstances in which she was placed gave her the opportunity to employ. * * * Culpable misconception as to his duty on the part of the mate, and inattention and carelessness on the part of the lookout, induced, perhaps, by the remarks of the mate, 'that it was a steamer, and that she would take care of herself,' was the primary causes of the neglect and omission of duty which led to the collision. * * * Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters."

If, in the case quoted, it was the duty of the *Sunnyside*, a sailing vessel, having the right of way, to maintain a vigilant lookout and to depart from the rule which requires a sailing vessel when meeting a steamer to hold her course, much more was it the duty of the *New York* to be watchful and vigilant, and to stop or check or adopt some other precaution to avoid colliding with the *Conemaugh*. "Reasonable care and vigilance," would have enabled the men on the *New York* to have discovered the presence of the *Conemaugh* and what her course and movements were. If the *Sunnyside* was in fault on account of a want of attention and vigilance on the part of

her lookout, what shall be said of the lookout on the New York? If reasonable care and attention would have enabled the men on the Sunnyside to have discovered that the tug was not going to get out of her way, like care and attention would have enabled the New York to discover her danger from the Conemaugh, and to have taken necessary precautions to avoid collision. Under the rule laid down by this court in the Sunnyside, it is impossible for the New York to escape condemnation.

The right of a vessel to keep her course does not relieve her from the obligation to maintain a careful lookout.

The *Chicago*, 61 Fed., 521, was a collision between a ferry boat and a tug in which the former was held in fault for failing to keep a proper lookout and to observe the attempt of the tug to cross her bow, in time to reverse. The court say:

“Even if she got a reply of two whistles from the tug, and had a right to expect that the tug would go under her stern, in accordance with that signal, she was not thereby absolved from the duty of attention to the movements of the tug until she got so near that collision was inevitable. Misunderstanding of signals is not infrequent; the execution of intentions is sometimes interrupted, or thwarted by new circumstances. The necessity and the duty to maintain a lookout continue the same.”

See the *Franconia*, 3 Fed., 397.

The *Gladiator*, 41 Fed., 927.

The *Clara*, 51 Fed., 1021.

The *Eagle*, 69 Fed., 157.

II.

THE NEW YORK WAS ALSO IN FAULT FOR VIOLATING
RULE 21. WHICH REQUIRES THAT:

“Every steamer when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse.”

This rule is imperative; it has no exceptions. It applies to every steamer which is approaching another vessel so as to involve risk of collision. No matter what their respective courses may be, or which of two steamers has the right of way if they are approaching—i. e., if they are drawing near to each other so as to involve risk of collision—so that there is a probability that they may collide, then both steamers should obey the rule.

It is plain that the New York and the Conemaugh were approaching each other so as to involve risk of collision, and such is the statement contained in the opinion of the Circuit Court of Appeals where it said:

“It is not disputed that the courses of the two vessels were crossing *so as to involve risk of collision*, and that the Conemaugh had the New York “on her own starboard side.”

Rec., p. 278.

This statement is fully justified by the pleadings and by the evidence in the case. That the New York did not comply with the rule must be admitted. The answer states that when the Conemaugh sounded her alarm the steamers were not more than 100 feet apart, and that the collision was then *inevitable*. In the court below counsel for the New York conceded that up to that time the speed of the New York was ten miles an hour, and that

the steamers were approaching each other at the combined speed of 666 feet in thirty seconds; the speed of the New York being 440 feet in thirty seconds. No attempt was made on her part to slacken speed or stop and reverse. Her guilt in this respect is self-confessed.

THE C. H. SEUFF, 32 FED., 237, was a case of collision between the Pavonia and the Seuff when on crossing courses, the Seuff having the Pavonia on her starboard side. The Pavonia was held in fault for not stopping and backing, although she had the right of way. The Court says:

"The courses of the two vessels were clearly 'crossing and the continued absence of the Seuff's 'red light from sight when the boats had approached within a quarter of a mile of each other, 'it seems to me, was such clear evidence of a 'risk 'of collision' as made it obligatory upon the ferry 'boat to stop and back under the twenty-first rule. 'Though the Pavonia might keep her course she 'was not absolved from backing as required by 'that rule and by Rule 24, when that became necessary in order to avoid collision."

IN THE AMERICA, 32 FED., 845, a steamer having the right of way was also found in fault for not stopping and backing. The Court say:

"When he (the America's pilot) saw that the Talisman was crossing his bows, although he had the right of way, it was his duty to reverse at once in order to avoid collision; because he knew that from that moment there was clear risk of collision and a reversal was necessary."

THE BALTIMORE, 34 FED., 660, was a similar case in which the Court said:

"As respects the Baltimore, the case is similar to many others, in which, notwithstanding the primary fault is that of the vessel bound to keep out of

the way, the other vessel is also held in fault for not stopping and backing as soon as the purpose of the former vessel to go ahead was clear, and when it was manifest that the other could no longer, by her own efforts, avoid collision. So long as the vessel bound to keep out of the way has clearly time and space enough to do so, *and there are no certain indications of any contrary intent*, the other vessel has a right to presume that the former will do her duty, and is not bound, under Rule 21, to stop and reverse. When that limit is passed, Rule 21 requires immediate stopping, and reversing, if necessary, to avoid collision."

If we assume that it was the duty of the Conemaugh to keep out of the way of the New York, still her thrice repeated signals of two blasts each, and the exhibition of her green light were *clear and certain indications of a contrary intent* which the New York should have regarded.

IN THE AURANIA AND THE REPUBLIC, 20 FED., 98-124.
Judge Brown said:

"Even, therefore, if the Republic had the right of way, it would have been her duty, being the steamer astern, and the intent of the other to go ahead being clear, to slacken speed at once, or stop if necessary. Having the right of way does not dispense with the seventeenth [21 rule], nor supersede the obligation to stop when actual risk of collision is impending. This is settled by the English decisions and by many decisions in this country." Citing the *America*, 92 U. S., 432-438; The *Sunnyside*, 91 U. S., 218.

See also the *Columbia*, 25 Fed., 844.

It was suggested, and the Circuit Court of Appeals seems to have adopted the suggestion in its opinion, (Rec., p. 285) that the New York was justified in maintaining her speed under the decision in the *Brittania*, 153 U. S., 130;

and the *Delaware*, 161 U. S., 459. We submit, however, that a careful examination of the facts in those cases show that they have no application to the case at bar.

In the *Brittania* it is clear that both steamers maintained a proper lookout and were moving at reduced speed, which cannot be said of the *New York*. The *Brittania* had the *Beaconsfield* on her starboard side. The *Beaconsfield* signaled the *Brittania* to pass on her starboard side. The *Brittania* signaled her assent, and it was "evident that the pilots of both vessels agreed in the fact that the proper thing to avoid a collision was for the *Brittania* to swing to starboard and pass behind the *Beaconsfield*." But as the *Brittania* did not seem to swing to starboard in accordance with the signals that were exchanged, the *Beaconsfield* blew another whistle, which again signified her expectation that the *Brittania* would pass under her stern, and then "put her wheel hard aport, and stopped her engines and reversed at full speed." After her headway was overcome her engines were stopped and she lay still in the water about a minute and a half and until the collision. If she had not stopped and backed, the *Brittania* would have passed a short distance astern of her in accordance with the signals. The Court found that the apparent delay of the *Brittania* in changing her course to starboard according to the signals which had been exchanged, was due to a current or eddy in which she found herself, and that the *Beaconsfield* was to blame for "overlooking the effect of such current in delaying the movements of the *Brittania* to starboard. The course of the *Brittania* was precisely what might have been anticipated * * * and did not * * * warrant the *Beaconsfield* in disregarding the injunctions of the 23d rule, which, if obeyed, would have prevented the collision." The *Beaconsfield* was also held in fault "in remaining motionless for a minute and a half

in full view of the direct actions of the *Brittania* in going astern." The decision of the court is thus summarized at p. 141:

"This disregard by the *Beaconsfield* of the *Brittania*'s signal and her failure to obey the rule and keep her course, her supine negligence in remaining motionless for so long a period while she saw the *Brittania* approaching her, clearly put her in fault."

That the court did not intend to decide that a steamer which has the right of way is to keep her course and go ahead with unabated speed, regardless of any other duty, is apparent from what is said in the opinion at page 142:

"The collocation of the rule and its direct reference to Rules 17, 19, 20 and 22, plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done, if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the twenty-fourth rule. As we have seen, no such exigency is found to have existed in the present case."

At p. 137 the Court says:

"The nineteenth rule is as follows: 'If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.' We do not understand this rule to signify, as the Circuit Judge seems to have thought, that the *Brittania* was at all hazards, and in some way or other, to avoid the *Beaconsfield*. Such a rendering of the rule would dispense with all inquiry beyond the single one, which vessel had the other on her starboard side. The plain meaning

of the rule was first applied to the situation under consideration, that the *Brittania*, which had the *Beaconsfield* on her starboard side, should yield the path to the latter, and pass behind her. This reading of the rule was recognized and complied with in the first instance by the pilots of both vessels in signalling each other that the *Brittania* should go astern."

In the *Brittania* the Court affirmed the decision of the District Judge, who said:

"It is to be observed, first, that none of these rules are to be taken absolutely or independently of the rest. They are to be construed and applied together with reference to each other and to their common design, viz, to prevent collision. Hence, when observance of a rule would plainly tend to bring about a collision, which a departure from the rule would avoid, departure becomes a duty."

In the Delaware this court said:

"The case of the *Brittania*, 153 U. S., and the *Northfield*, 154 U. S., 629, must be regarded, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least *in the absence of some distinct indication that she is about to fail in her duty.*"

Assuming that it was the duty of the *Conemaugh* to keep out of the way of the *New York*, we still insist that there were "distinct indications" that she was about to fail in her duty.

1. The exhibition of her green light to the *New York*, together with her thrice repeated signals of two blasts each, were a distinct announcement, "in the language of the sea," that she intended to cross the course of the *New York*.

2. As expressly found by the Court of Appeals (Rec., p. 281):

"The Conemaugh, being where she was, was either in or dangerously near the course of the New York, and was not keeping out of the way."

We submit that in view of the narrowness of the channel between the course of the Burlington's tow, and the Canadian shore, the probability that the steamers would meet in that channel, in view of the signals sounded by the Conemaugh and the exhibition of her green light, it was clearly the duty of the New York to check her speed, or, if necessary, stop and reverse. Had she done so the collision would have been avoided.

The Friezland, 76 Fed., 591.

The City of Chester, 78 Fed., 186.

The Louise, 52 Fed., 885.

The Grand Republic, 16 Fed., 424.

The Memnon, 6 Asp. Mar. Cas., 317.

In this connection we quote what was said in the case of the *Milwaukee*, *Brown's Admr.*, 330, a case which has often been cited with approval.

"It was claimed that the obligation to check did not attach to the *Lac la Belle*, because but for the mistake of the *Milwaukee* in starboarding when she ought to have ported, there was no danger of collision. That the *Lac la Belle* had a right to assume that the *Milwaukee* would obey the law, and if she had done so there would have been no collision, notwithstanding the excessive speed complained of. This doctrine, carried to its ultimate results, would avoid all rules having for their object the enforcement of precautionary measures for preventing collisions, and would recognize the right of a vessel, herself technically obeying the rules, unnecessarily to run another down, which, accidentally or otherwise, might come in her way in consequence of some non-observance of those rules, neither of which results would for a moment

be recognized as law by the learned advocates who advanced the doctrine stated."

The Court of Appeals excused the New York for her failure to maintain a proper lookout upon the ground that, as the Conemaugh received no answering signal from the New York, it was her duty to keep to the port of the New York and pass on that side.

The Court in its opinion says:

"Again, how did the New York's failure to see the Conemaugh contribute to the collision? Suppose the New York's lookout had seen every maneuver of the Conemaugh, would her course have been different from what it was? We do not think so. She had the right to maintain her course, and that we have found she did. She would have had no right to infer that the Conemaugh would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the Conemaugh, not having established an agreement to pass starboard to starboard would maintain her bearing to the port of the New York and swing clear on that side. Especially is this the case when, if she had seen the Conemaugh, she would have observed her swinging slowly to the port of the New York in the wake of the barges in the tow, although blowing signals of her intention, if assented to, to change her course to the starboard of the New York."

Again it is said in the opinion:

"The only risk of collision would have been in the Conemaugh's failure to keep to port, and this failure she was not bound to anticipate."

Rec., p. 285.

The statement that the Conemaugh was "bearing to the port of the New York," and that she was following in the wake of the barges, is, we submit, inconsistent with the fact, which the opinion says "is not disputed," "that

the courses of the two vessels were *crossing so as to involve risk of collision*, and that the Conemaugh had the New York on her own starboard side." Now the courses could not be crossing so as to involve risk of collision, and the Conemaugh could not have the New York on her own starboard side if the Conemaugh was "bearing to the port of the New York."

The conclusion of the Court of Appeals is also inconsistent with the fact which is stated in the opinion (Rec., 281), that

"The Conemaugh, therefore, being where she was, was either in or dangerously near the course of the New York, *and was not keeping out of the way.*"

It is also inconsistent with the other facts stated in the opinion (Rec., p. 282) that

"The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light."

Now if the vessels were on these "slanting" courses, the New York must have been showing to the Conemaugh her red light, and the Conemaugh must have been showing to the New York her green light, unless, indeed, the course of the Conemaugh was such that it would have taken her across and under the stern of the New York, which nobody pretends was the fact.

These conclusions of the learned Court, we submit, are also inconsistent with the case stated in the libel filed by the owners of the Conemaugh, and in the answer and cross-libel filed by the owners of the New York.

The libel distinctly avers that the Conemaugh was proceeding on a course which would cross the New York's course, and that she notified the New York by her two-blast signals that she was so directing her course "as to

go well in on the Canadian shore and leave the tow and the New York to starboard, as she should come abreast of them respectively." (Rec., p. 2.) The answer avers "that while passing under the stern of (the last) barge * * * several short blasts of a propeller, which afterwards proved to be the Conemaugh, were heard close at hand and not more than 100 feet away. The Conemaugh *pursued her course directly across the bows of the New York.* A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York. * * * The Conemaugh, with considerable headway, *continued on her course across the bows of the New York.* so that the latter was struck stem on," etc.

Rec., pp. 9-10.

The cross libel contains substantially the same averments. The answer, of course, was prepared by counsel from information furnished by the men who were on the New York. The language used is entirely plain and unambiguous. It is a clear, direct statement that the course of the Conemaugh lay directly across the course of the New York, and that when the several short blasts which constituted a signal of alarm was sounded by the Conemaugh, she was then *pursuing*, or keeping on her course; and that she *continued* on the same course across the bows of the New York until the collision was inevitable, and until the New York struck her stem on. There is no intimation in the answer or cross-libel that the Conemaugh was thrown across the bows of the New York by any sudden starboarding or change of course on her part. On the contrary, the answer and cross-libel are only consistent with the fact that the course of the Conemaugh was such that she was *never* bearing to the port of the New York, but that it was *always* across the wake of the barges, and *across* the bows of the New York.

In reaching its conclusion the Court of Appeals must clearly have misapprehended the testimony in the case; for we submit that the conclusion is inconsistent with the undisputed testimony.

It is true that after starboarding in compliance with the signals which were exchanged with the Burlington, the Conemaugh ported. But notwithstanding such porting, her course was at an angle of about forty-five degrees, or four points with a line drawn directly across the river; so that the steamers were approaching each other at an angle of about six points, and not on courses nearly parallel, as they must have been if the Conemaugh was following in the wake of the barges; the finding of the Court of Appeals being that the New York's course was about parallel with that of the last two barges.

CAPTAIN MILLER, the master of the Conemaugh, says that she headed with reference to the Canadian shore a trifle down steam—less than forty-five degrees from right square across.

Rec., p. 18.

KELLY, the wheelsman, says that after porting he *steadied*; and that they were then "slanting down about two or three points from straight across."

Rec., 111-112.

On cross-examination, he says:

Q. The next thing you got was an order to port a little?

A. Yes, sir.

Q. Then your boat blowed?

A. No, she didn't blow yet.

Q. Then what next order did you get at that time?

A. Port a *little*; follow the tow around.

Q. Did you port a *little*?

A. Yes, sir.

Q. Did you then get an order to steady?

A. Why, yes; after she came around and got *slanted* down the river he says steady. * * *

Q. As I understand you, after you had ported and *steadied*, you were heading about two or three points off a course directly across the river.

A. Yes, sir. On a slant across the river, a little down.

Q. And you *kept* on that course until you got the order to starboard?

A. That is what I done.

Q. And then you got the order hard-a-starboard?

A. That is what. * * * And for the first time I saw the New York * * * about two or three boats' lengths from us; as I said before, like she was coming straight for us. * * * She was heading right for us.

Rec., pp. 114-115-116.

HOGAN, the second mate, who was in the pilot-house assisting at the wheel, testifies:

Q. Now, Mr. Hogan, how much did your vessel port in your best judgment, we will say from heading directly across the stream?

A. Well, I should say somewheres between *three and four points*, * * * and then she *steadied*; and the next order was hard astarboard.

Rec., pp. 139, 140, 141.

"Under that final starboarding our vessel probably swung a point and a half or two points."

Rec., pp. 140-141.

On his cross-examination he says:

Q. When did you get the order to port. I will read

your language: "The captain said, do you see the stern of that tow? I said I did, and the wheelsman answered something, and the captain said, port and follow." You heard that conversation?

A. Yes.

Q. Was that before or after you blew the third blast of two whistles?

A. It was before.

Q. Did you port and follow them when the captain told you to?

A. Yes, sir.

Q. How much did your boat swing under that porting?

A. *Somewhere between three and four points.*

Q. How was she heading with reference to athwartships of the stream then; how many points down stream?

A. *Oh, probably about three points.*

* * * * *

Q. When you reached that position did you receive an order to steady; or did you steady without an order?

A. No, sir;

Q. Did you steady her?

A. The wheelsman steadied her. I was not handling the wheel. *She was steadied; I saw her steadied.*

Q. Then you looked out and saw the red light of the steamboat below? Is that right?

A. Yes, sir.

(The witness then placed the models to indicate the position and courses of the two vessels, which unfortunately has not been preserved.) His testimony proceeds:

Q. Could you then see between the tail end of the tow and the Canadian shore?

A. Yes, sir; not directly down the river. I don't know as I could at that time.

Q. The Conemaugh had not gotten under the stern of the rear barge at that time?

A. No, sir.

Q. It was before the Conemaugh got to the stern of the rear barge that she blew the third blast or two whistles?

A. Yes, sir.

Q. And the boats were then in about the position below as you have placed them?

A. Yes, sir.

Q. With the New York between the second and third barges from the tail end of the tow?

A. Yes, sir.

Q. Showing her masthead and red light?

A. Yes, sir.

Q. Could you tell how she was heading?

A. Well, by the lights she was showing, she was heading over towards the Canadian shore.

* * * *

Q. You then blew the third blast of two whistles?

A. That was when she was about where she is now. (Referring to models.)

Q. Then the Conemaugh stood *on under a steadied* helm, did she?

A. Yes, sir; for a little while.

Q. And across the line of the tow?

A. No, sir; that was when she was in this position, I should judge.

Q. Now, when they were in that position you blew the alarm signal?

A. No, sir; that is the position they were in when he blew the last two whistles.

Q. Standing down with a *steady helm*?

A. Yes, sir.

Q. And continued to stand with a steady helm for a short time, and blew an alarm signal?

A. Yes, sir.

Q. And when you blew the alarm, you had cut (crossed) the line of the tow, had you, so you could look down the port side of the last barge?

A. Yes, sir; but we were not as close to the tow as that though.

Q. When you blew the alarm, then you had cut the course of the tail end of the tow, and could look down the port side?

A. Yes, sir.

Q. And you swung, * * * you blew the alarm and put your helm hard starboard?

A. Yes, sir.

Q. And you swung about a point and a half, you think, before she struck?

A. Didn't swing as much as that.

Q. How much did she swing?

A. (Placing models) That is the position she was in when she struck.

Q. You didn't strike—you didn't swing at all under that hard starboard, did you?

A. Yes, sir; she swung some. *

Q. A point?

A. Probably that.

Q. About a point?

A. Yes, sir; from that to a point and a half.

Q. She didn't swing six points?

A. No, sir; she didn't swing more than a point and a half; somewheres in that neighborhood.

* * * * *

Q. She struck you at an angle of seven points you think? Seven points on the starboard bow?

A. Yes, sir; pretty near. Call it that.

Rec., pp. 147-148-149.

Now, if the Conemaugh instead of crossing the wake of the tow, was following along in it, for an appreciable time while she was blowing her signals as stated in the opinion of the Court of Appeals (Rec., p. 282), the New York could not have struck her on the starboard bow at an angle of seven points (almost a right angle), if she swung only a point or a point and a half after sounding the alarm signal. If she was following in the wake of the tow when she was sounding her signals, her course must have been nearly parallel with the course of the New York; and it was impossible, by any starboarding of her wheel, to change her course to one nearly at right angles with the course of the New York; the vessels being so near together as it is conceded that they were when the order to starboard was given.

CAPTAIN MILLER, the master of the Conemaugh, was recalled and on his further cross-examination testifies:

Q. You had blown her [the New York] three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. And she had not replied to you at all?

A. No.

Q. Why didn't you go down on the port side of her when you saw the boats in that position?

A. Having signified my intention, I concluded it was best policy to *hang onto the course I was on*.

Rec., p. 187.

* * * * *

Q. And the only reason you can give for not porting, and going down on her port side at the time the boats

were in the position that you have placed them, is that you had blown two whistles?

A. Yes, sir.

Q. And you thought you must *keep* the course you indicated by those whistles?

A. Yes, sir.

Q. You knew you had the right to take either side of her, didn't you?

A. I supposed I had a right to hang onto that side of her, after I had signaled my intention.

Q. You were navigating under the theory that you had the right to that side because you had whistled for that side?

A. Yes, sir.

* * * *

Q. Did you expect him to starboard and go across the stern of that barge?

A. Under the stern of the barge; yes, sir.

Q. And leave you room to go down on his starboard side?

A. Yes, sir.

Q. You understood it was his duty to do that?

A. Yes, sir.

Q. Because you had blown him two whistles?

A. Yes, sir.

Rec., pp. 188.

* * * *

Q. You expected when she reached the proper point, whatever it was, that she would pass on your starboard side?

A. Yes, sir.

Q. You expected that because you had blown her two whistles?

A. Yes, sir, when I was blowing those whistles almost *across* her course.

Q. You had her on your starboard side?

A. Yes, sir. (Rec., p. 190.)

The witness also testified that he was seeing both of the colored lights of the New York, and on his cross-examination he was asked:

Q. Did it occur to you that the lights were kept in view because you were *running across his course all the time?*

A. Yes, sir.

Q. That was the reason they were kept in view?

A. Yes, sir.

The testimony shows very clearly that after the porting of the Conemaugh her course was *diagonally* across the river at an angle of about three or four points with a line directly across; and that she was *steadied and kept* on that course until the vessels were so near together that collision was inevitable; and that she then starboarded, and swung about one and a half points when she was struck by the New York at nearly a right angle. The testimony fully justifies the fact stated in the opinion (Rec., p. 278), "that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side;" and that from the time the second blast signal was sounded by the Conemaugh to the New York, until the third blast was given, "the New York was proceeding from the American side in a slanting direction, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light." (Rec., p. 282.)

The only testimony referred to by the court in its opinion to show that the Conemaugh was not crossing the wake of the barges, but was following along in it for an appreciable time while sounding her signals, is that of

the masters of the two last barges, who, it is stated in the opinion, say, that "for some time before the third signal blast they saw both of the side lights of the Conemaugh."

With deference, we submit that the court has misapprehended their testimony.

CAPTAIN JEANS, of the Amaranth (Rec., p. 87), testifies as follows:

* * * Q. What did you see of the Conemaugh?

A. When I first noticed her she was coming down the river; I thought he was a little in the center of the river, a little more on the American side; and I saw him after we began to turn around, starboard his wheel; I thought he was going under our stern. I watched him closely, and I saw his green and red and masthead light along until he came to sheer on the Canada side, then I lost his red light and saw his green light.

This evidently refers to what the witness saw when the Conemaugh starboarded in compliance with the signals exchanged between her and the Burlington, and opened her green light to the barges; and before she exchanged signals with the New York. By the "sheer on the Canada side," he does not refer to her hard starboarding immediately before the collision, but to her movement toward the Canada side for the purpose of passing between that shore and the tow, before she sounded her first signal to the New York. This appears from his testimony on cross-examination (Rec., pp. 91-92), where he says:

The Burlington blew first, and the Conemaugh answered with two blasts.

Q. Then what did the Conemaugh blow?

A. A few minutes after that she blew one more blast again.

Q. Had the Conemaugh then starboarded?

A. Yes, sir; he was starboarded then; going near the Canada side, I presume.

Q. Where was she when she blew to the Burlington?

A. She was pretty well up the river; I should judge between a mile and three-quarters of a mile. She starboarded a little while afterwards.

Q. Did you see her port or steady after that?

A. I saw nothing of that kind. I saw him coming, slowly starboarding his wheel.

Q. And he did not change his course at all that you could see?

A. No, sir; not where I was.

Q. Where was the last barge, or where was he with reference to the last barge when he blew the first signal to the New York?

A. I should judge the Conemaugh was then about seven or eight hundred feet from the last barge.

* * * * *

Q. Now let me understand you. You say he was seven or eight hundred feet from the last barge. On which side of the last barge was he?

A. He was right astern and going a little on the port side of her, and he was pretty well over to the Canada side.

Q. Then he was on the port side of the last barge when he blew his signal to the New York?

A. Yes, sir, he was right opposite when he blew his two whistles—right astern of her.

Q. Then he was under a starboard helm?

A. That I don't know. I was not aboard the New York. I was aboard the Amaranth. I could not tell what he was doing. I know he was heading for the Canada side of the tow.

Q. He was heading right for the Canada bank?

A. Not right plump for the Canada bank; going slant-wise like.

Q. And he kept going for the Canada bank as long as you saw him?

A. Yes, sir.

See Rec., p. 92.

At p. 93, after placing the models, he further testifies that when the next whistle was blown the New York and Conemaugh were pretty close together.

Q. The New York had passed the Amaranth?

A. Yes, sir.

Q. And she was passing her on the same course she had been on before?

A. Yes, sir.

Q. So far as you know, after the New York had shown you the red light, she kept coming on a straight course down towards you?

A. Yes, sir.

Q. She made no change of course that you saw?

A. Not that I know of. As long as she was clearing me she was clearing the other barges too.

Q. And the Conemaugh made no change of course?

A. Not that I know of.

This testimony is inconsistent with the idea that the Conemaugh was following in the wake of the barges, or that she ported so as to show her red light to the master of the Amaranth, while she was sounding her signals to the New York.

CAPTAIN SMITH, of the barge Ferguson, on his cross-examination (Rec., p. 103), says:

Q. When the Conemaugh was blowing her whistles to the New York, she was on your starboard hand astern, wasn't she?

A. Yes, sir.

Q. And when she blew the alarm whistle she had got under your stern?

A. She was directly astern of me.

Q. And the collision occurred immediately after that?

A. Shortly after that.

Q. Were you looking at the vessels when they came in collision?

A. Yes, sir.

Q. What light was the Conemaugh showing you?

A. Showing a green light.

Q. Masthead light and green light were the only lights you saw?

A. Yes, sir; after she rounded the river, I saw her cabin lights.

Q. You saw at the same time the red light of the New York?

A. That is all.

Q. So that just before the vessels came in collision they were showing each other the red and the green lights; that is, the New York was showing her red light to the green light of the Conemaugh.

A. I should judge she was showing all three lights to the Conemaugh.

Q. But from your position you saw the green light of the Conemaugh and the red light of the New York?

A. Yes, sir.

Q. * * * What lights did you see at the time she blew the whistles to the Burlington?

A. I saw the red and masthead light. His port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. Did you see both of the Conemaugh's lights at any time?

A. Yes, sir; right after the signal I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile I should judge up the river.

Q. Was she a quarter of a mile up and over on the American side of the center of the channel; is that it?

A. Yes, sir; somewhere along that side.

Q. You say she blew the New York three separate signals of two blasts?

A. Yes, sir.

Q. And during that time she was astern of your barge and on the starboard side of you?

A. On the starboard side of me.

Q. As I understand you, it wasn't until she blew the alarm whistle that she got from under your stern?

A. She was passing across my stern.

Q. About how far was she astern of you?

A. She was three or four lengths of herself I should judge.

Thus far the testimony of Captain Smith clearly shows that the Conemaugh was not following in the wake of the barges, but was on a course diagonally across the river, intersecting the course of the barges.

It is true that at Record, p. 106, he testifies that he got a glimmer of the Conemaugh's red light, and that she appeared to be following him around. We all know how difficult it is for persons on a boat which is moving to judge of the movements of another, especially in the night time. And the testimony of Captain Smith as to getting a glimmer of the red light and as to what appeared to him to be the movements of the Conemaugh, however it may be construed, is entitled to but little weight with

respect to the heading and course of the Conemaugh, as against the positive testimony of the Conemaugh's master who was directing her movements, and the testimony of the second mate and wheelsman, he were in the pilot-house and in charge of her wheel.

The established rule is "that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation."

The Alexander Folsom, 52 Fed., 411.

The Hope, 4 Fed., 89.

The Winan, 20 Fed., 248.

The Alberta, 23 Fed., 807.

If we apply this well established rule we can reach no other conclusion, than that the course of the Conemaugh up to the time she sounded her alarm whistle and hard starboarded, was diagonally across the river, and that she did not at any time follow in the course or wake of the barges; and it follows that the collision resulted while she was "pursuing" this course which took her across the bows of the New York as stated in the answer. In other words, her course all the time was substantially across the river and across the course of the New York, and that she adhered to that course as she indicated to the New York she would do by her repeated two blast signals. There is no testimony that the Conemaugh at any time exhibited her red light to the New York. On the contrary, the men on the latter steamer from first to last could have seen only the green and white lights of the Conemaugh, which with the two blast signals sounded by the Conemaugh ought to have been a sufficient indication of her determination to proceed across the bow of the New York, and to pass down on her starboard side.

If the bearing of the Conemaugh was at any time to the port of the New York, if she was at any time on a course to the port of the New York, if she at any time exhibited her red light to the New York, the fact could be easily established by the testimony of the officers and men who were on board the New York. These officers and men were present at the trial in the District Court; but they were not called as witnesses. The presumption is that if they had been called, their testimony upon this point would have shown that such was *not* the course of the Conemaugh, but that, on the contrary, she never exhibited her red light to the New York, and that her bearing was never at any time to the port of the New York, but that her course during all the time she was signaling to the New York was across the wake of the barges, and across the course of the New York.

With great respect we submit that a lookout on the New York at no time could have seen the red light of the Conemaugh, as suggested in the second opinion of the Circuit Court of Appeals, 82 Fed., 814. If any one on the New York could have seen it, or did see it, why were they not called to testify? They were present in the District Court, but they were not called to the witness stand.

Admitting that the Conemaugh was in fault in pursuing her course across the course of the New York, and for not checking or stopping, nevertheless the New York was also guilty of fault in not discovering the movement and in not heeding the warnings which she received from the Conemaugh's signals. Indeed, the more glaring the fault of the Conemaugh in this respect, the more culpable does the conduct of the New York appear.

It is clear under the facts found by the Court of Appeals that the steamers were approaching each other so as to involve risk of collision, and it was the duty of both under

the express provision of the Act of Congress, to check, or if necessary, stop and reverse.

It seems that the court must have misapprehended the testimony of the witnesses who speak of the Conemaugh porting and following the tow, and that the court was misled in respect thereto. Captain Miller, the second mate and the wheelsman, certainly use such language in their testimony; but it is common for sailors to use such expressions in describing the movements of a vessel, which in a general sense is going off toward another vessel moving on such a course as the barges were on. And when the Conemaugh's witnesses speak of "following the tow," they simply mean that their steamer, instead of continuing to head directly across the river or a little up stream, as she did for a time after starboarding, in compliance with the Burlington's signals, ported so as to cross the wake of the tow for the purpose of passing the tow in compliance with her understanding with the Burlington. This is a fair construction of their testimony, taken as a whole.

The court seems to have fallen into the error of supposing that the Conemaugh continued to swing to starboard towards the barges, and to have overlooked the fact that she ported ONLY THREE OR FOUR POINTS from a line directly across the river, "AND THEN WAS STEADIED." In other words, the court seems to have entirely overlooked the fact that "she was steadied" after she had swung only three or four points down the river, and that after so steadying no other change was made in her course until her wheel was put hard astarboard immediately before the collision. The fact that she was steadied is proved by the testimony of the master, the second mate and the wheelsman. These witnesses were uncontradicted. She never headed more than three or four points down the stream, and consequently her bearing

was never to the port of the New York, but was all the time across the bows of the New York.

III.

AS TO THE DUTY OF THE NEW YORK UNDER THE SUPERVISING INSPECTOR'S RULES TO ANSWER THE SIGNALS OF THE CONEMAUGH.

The Court of Appeals holds that the Conemaugh was bound by Rule II. to pass to the right or under the stern of the New York. If this be true, and if Rule II. was applicable to the case, then Inspector's Rules III. and VI. were also obligatory upon both steamers, because if one of the rules was obligatory, the others were also.

Rule II. "When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Rule III. "If when steamers are approaching each other, the pilot of either vessel fails to understand the course of the other, whether from signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and after the vessels have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

Rule VI. "The signals by the blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting 'head and head' or nearly so, but at all times when pass-

ing or meeting at a distance of within half a mile, and whether passing to the starboard or port."

It is clear that the New York failed to comply with these rules in regard to signals. The two steamers were meeting or passing within a distance which was much less than half a mile of each other, and therefore it was the duty of both to signal. Even if it were true that the Conemaugh was swinging to the port of the New York, which we think we have shown by the testimony cannot be true, their courses could not have been more than about a hundred feet apart. The duty of the New York to answer the Conemaugh's signals was therefore imperative. But it is suggested that the indications of the Conemaugh's lights were such that it might have been inferred therefrom that she was complying with her obligation to swing to starboard and out of the way of the New York. Such indications are very often deceptive, and the inference derived therefrom incorrect. Such was the fact in this case; for the master of the Conemaugh testifies expressly that he intended to "hang onto his course,"—to keep on his course across the bows of the New York. The purpose of the rules as to signals is to prevent mistakes being made, and the consequences of such mistakes. This is illustrated by the case of the *City of Norwalk*, 55 Fed., 98, where Judge Brown said:

"But I do not find it necessary to determine the precise position of either vessel in the channel, or the lights which at different times might have been exhibited to each other; for both were swinging more or less, and different lights were no doubt exposed to view at different times during a short interval. Independently of these controverted points, there is sufficient to charge both the steamer and the tug with fault; because it was a misunderstanding by each as to the supposed intent of the other that caused the collision; and this misunderstanding could not possibly

"have happened had either given the signals required by the inspector's rules. * * * The rules as to signals are designed for the purpose of securing a common understanding, and of preventing just such mistakes as the present." Citing "the Connecticut, 103 U. S., 710-713; The Sea King, 52 Fed., 894. "The duty to give such signal rested upon each alike, and both were to blame for the omission."

And in the same case the Circuit Court of Appeals for the Second Circuit, affirming the decision of Judge Brown, 61 Fed., 366, said:

"Manifestly this collision happened because the master of each vessel inferred from such indications as he noted, that the other was about to take a particular one of two known courses, when, in fact, the other's intention was to take the other course. It is the very object of the law providing for the giving of signals to increase the number of indications which may be noted and reasoned from, thus promoting the accuracy of the inferences drawn from them. That both vessels failed to conform to the inspector's rules is hardly disputed. * * * When violation by each vessel of an express rule in navigation is plainly apparent, each must be held to blame, unless it is clearly shown that the technical fault did not contribute to the collision."

The Saginaw, 84 Fed., 705.

The Bowden, 78 Fed., 649-652.

The British Queen, 89 Fed., 1003.

As already stated, the vessels were certainly within half a mile of each other at the time the Conemaugh blew her second signal to the New York; and when they came within that distance it was the duty of each to signal under Rule VI., and the failure by either to signal would be a fault for which she should, prima facie, be condemned. If the New York did not hear the Conemaugh's

signal, then, under Rule VI., it was her imperative duty to signal to the Conemaugh. The duty to signal under Rule VI. was obligatory on both steamers. The New York failed to perform that duty, and was therefore in fault.

As already argued, the two blast signals of the Conemaugh were a distinct indication that she was not going to keep out of the way by porting, but that she was going across the New York's course. If the pilot of the New York did not understand this, if he was in doubt about it, it was his duty under Rule III., "immediately to signify the same by giving several short and repeated blasts of his steam whistle and reduce his speed to bare steerage way." If he was in doubt, he violated Rule III. by not doing so; and was therefore in fault and should be condemned under the rule that if a ship at the time of a collision is in actual violation of a rule intended to prevent collisions, the burden rests upon her of "showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been one of the causes of the disaster."

The Pennsylvania, 19 Wal., 136.

R. & O. Nav. Co. vs. Boston Mar. Ins. Co., 26

Fed., 596.

How can it be said that the failure of the New York to comply with the inspector's rules did not contribute to the collision? Who can say that if she had sounded either a one blast signal or an alarm, that the Conemaugh might not have checked or stopped, and thus have avoided the collision? But it is enough that the law presumes that her failure to comply with the rules did contribute to the collision, and that she was guilty of fault. The master of the Conemaugh testifies that he expected that the New York would starboard so as to pass between

him and the tow. It may be that he had no right to rely upon her doing so. A one blast signal from the New York would have corrected his misapprehension and probably have prevented the disaster.

IV.

AS THE CONEMAUGH AND NEW YORK WERE ON CROSSING COURSES WHICH INVOLVED RISK OF COLLISION, THE NEW YORK WAS NOT JUSTIFIED IN CHANGING HER COURSE BY PORTING, BECAUSE OF THE PRESENCE OF THE BARGES IN THE TOW OF THE BURLINGTON.

The question which arises under this proposition relates to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel.

It is an important fact not to be lost sight of that the Conemaugh had answered the two blast signal of the Burlington, and had starboarded to pass between the tow and the Canadian shore in compliance with that signal, before her watch discovered the presence or the approach of the New York; and that it was while she was thus heading towards the Canadian shore that she gave her first two blast signal to the New York. The officers of the New York ought to have heard, and had they maintained a proper lookout they doubtless would have heard the signals which were exchanged between the Burlington and the Conemaugh; and they should have known from those signals and the manner in which the Conemaugh starboarded, that she intended to pass down the river between the barges and the Canadian shore, and that she had so shaped her course for the purpose of carrying out her agreement with the Burlington. The officers of the New York knew of the presence of the tow; and if it was difficult for her master to locate the stern

barges definitely so as to determine the width of the channel between them and the Canadian shore, this fact, in connection with the other fact that the *Conemaugh* was intending to pass down through that channel, required the *New York* to move with great caution, especially as he knew, or ought to have known, that he would probably meet the *Conemaugh* in that narrow channel if he changed his course to starboard.

The rule laid down in the *John L. Hasbrook*, 93 U. S., 405, that a sailing vessel required to keep her course when approaching a steamer so as to involve risk of collision, does not violate her duty by such necessary variations of her course as to enable her to avoid immediate danger arising from natural obstructions to navigation, ought not to be applied to the *New York* in this case. The barges were not natural or fixed obstructions, like a rock, or bank, or shoal. They did not constitute such an obstruction as would justify the *New York* in departing from her course and rushing into the narrow channel near the Canadian shore, where she knew or ought to have known she was likely to meet the *Conemaugh*. The barges were vessels under way, moving in a direction diagonally across the river which would take them out of the way of the *New York*. They were in the tow of the *Burlington*, and their speed independent of the current was at least two or three miles an hour. They would have gotten out of the way, and left the *New York* a clear and unobstructed passage on her course, if the latter had but checked her speed for a few moments. Common prudence, and the "special circumstances of the case," required the *New York* to check her speed and keep her course until the barges got out of the way. Had she done so, even for a few moments, no collision would have happened.

The narrowness of the channel, and the fact that the Conemaugh was about to enter that channel on a course which crossed the course of the New York, increased the danger of navigation, and it was but a common precaution "required by the ordinary practice of seamen," and "by the special circumstances of the case," for the New York to check or stop until the barges got out of her way, and not to port and continue on with unabated speed. And I submit with deference that the doctrine laid down by the Circuit Court of Appeals in its opinion (Rec., p. 280) that the proper course of the New York "could not be affected by the fact of the Conemaugh's presence," is not consistent with the rules of navigation prescribed by Congress, and is likely to lead to disastrous results in the navigation of such a thoroughfare of commerce as the Detroit River. The New York, therefore, should be held in fault for violating Rule 24, which declares that:

"In construing and obeying these rules due regard must be had to all the dangers of navigation "and to any special circumstance which may exist "in any particular case, rendering a departure "from them necessary in order to avoid immediate "danger."

She also violated Article 20, which declares:

"Nothing in these rules shall exonerate any ship "or the owner or master or crew thereof from the "consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, "or the neglect of any precaution which may be required by the ordinary practice of seamen, or by "the special circumstances of the case."

The Elizabeth Jones, 112 U. S., 514.

If the pilot of the New York was not willing that the Conemaugh should carry out her agreement with the Burlington to pass around the tow leaving it on her starboard hand, or if he was in doubt as to what the course

of the Conemaugh would be in carrying out that agreement, he should have sounded an alarm as required by Inspector's Blue III. As he did not do so, it was emphatically a case which required him to keep his course and not to port so as to thwart the efforts of the Conemaugh.

Another reason why the New York was in fault for not holding her course and checking, if necessary, until the barges got out of her way, is that the channel between the barges and the Canadian shore being a narrow one, in which there was a considerable current, the Conemaugh, as the *descending vessel*, had the right of way.

There was no necessity for the New York to change her course on account of the barges. At most it was merely a matter of convenience on her part to do so, and it is well settled that a vessel whose duty it is to hold her course is not justified in departing therefrom simply because it is *convenient* for her to do so. She must hold her course unless prevented from doing so by some *necessity* or vis major.

The Illinois, 103 U. S., 298.

Marsden on Collisions, 493.

The Clara Davidson, 24 Fed., 763-766.

Spencer on Collisions, p. 202.

V.

IF THE NEW YORK WAS IN FAULT FOR THE COLLISION, SHE IS LIABLE TO THE OWNERS OF THE CARGO FOR THE FULL AMOUNT OF THEIR DAMAGES, ALTHOUGH THE CONEMAUGH WAS ALSO IN FAULT.

The owner or underwriter on the cargo in cases of collision brought about by the mutual faults of the colliding vessels, has the right to pursue either, or both, of the wrongdoers.

The Alabama and the Gamecock, 92 U. S., 695.

The Virginia, Ehrman, 97 U. S., 309, 317.

The Atlas, 93 U. S., 312.

The Beaconsfield, 158 U. S., 303.

The collision in this case occurred on October 21st, 1891, before the adoption of the Harter Act, and the rights of the parties, therefore, are not affected by that act.

In the Juniata, 93 U. S., 337, the steam tug Neafie was towing a flat boat and her cargo, both belonging to the United States; and while so engaged came into collision with the Juniata, which resulted in the loss of the flat boat and cargo, and also in damages to Pursglove, the owner of the steam tug. The courts below held both the Neafie and the Juniata in fault, and decree that the Juniata should pay \$10,000 to Pursglove and \$1,263.75 to the United States for half of the damages sustained by those parties respectively. On appeal, the Supreme Court reversed these decrees and followed the rule in the *Atlas*, that where an innocent party suffers damages by collision resulting from the mutual fault of two vessels, only one of which is libelled, the decree should be against such vessel for the whole amount of the damages, and not

for a moiety thereof. In the opinion delivered by Justice Swayne it is said:

"The branch of the case relative to the United States is upon a different footing. Their flat boat is neither alleged nor proved to have been in any-wise in fault. The principle of apportionment has, therefore, no application to them. Their boat not being inculpated, they are entitled to full damages. The decree of the Circuit Court is erroneous in not giving it to them. We should not adjudge that half of the amount should be paid by the tug and the other half by the steamer, but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offense being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages. The decree must, therefore, be changed, so as to require full payment to be made to the United States by the claimants of the Juniata. Whatever their rights may be as against Pursglove, by reason of such payment of more than one-half, must be settled in another proceeding. It cannot be done in this litigation."

The rights of the interveners in the case at bar fall directly within the rule laid down in the Juniata. They are to be treated as libellants against the New York alone. The relief prayed for by them is against that steamer alone, and they are entitled to the same relief against her as if they had filed independent libels against her. The original libel having been filed in behalf of the interveners as insurers of the cargo, as well as in behalf of the owners of the Conemaugh, and the New York having been bonded to answer the entire claim made by the libel, the interveners could not bring an independent action, but were compelled to come into the case as interveners. Their rights, however, as against the New York are the same as

though they, and they alone, had filed an independent libel against her.

In the Nahor, 9 Fed., 213, a libel was filed by the owner, master and crew of a schooner to recover damages for her loss, her pending freight, and cargo, and the personal effects of the master and crew by a collision. The vessel proceeded against was released on bail for the whole amount claimed in the libel. Subsequently the owner of the cargo filed a second libel to recover its value. It was held that the second suit was improperly brought, that the cargo owner should have intervened in the first suit. The court said:

"It is clear that the vessel having given bail for the value of the cargo in the first action, and the action being properly brought by the master and owners as carriers, for the loss of the cargo, she was not liable to be again arrested for the same cause of action. The proper and usual course in such a case, if the owner of the cargo desires to be made personally a party to the suit instead of trusting its management to his agents, the master and owners of the vessel, is to petition to be made co-libellant with them. The order of consolidating the actions in effect produces the same result; but as the commencement of the action was improper, the libellant Rokes must be charged with the costs of the second action, and the bond given therein must be cancelled without regard to the result of the first suit. The alleged reason for bringing the second suit is that counsel for the owner of the cargo entertained some doubts as to the relative rights of the owners of the cargo and the vessel, in case of an apportionment of the damages between the two colliding vessels. In any view that may be taken of the subject, I do not perceive that the position of the owner of the cargo could be any better as libellant in a second suit than it would have been as co-libellant in the first suit, as he could have made himself on motion. In any view of the case the filing of the second libel, and com-

selling the giving of further security, was improper."

The *C. H. Foster*, 1 Fed., 733.

The *Anchoria*, 9 Fed., 840. ¶

The *Grand Republic*, 10 Fed., 398.

Fritz vs. Bull, 12 How., 468.

Where the owner of the carrying vessel files a libel in behalf of himself and as trustee for the owners or underwriters on the cargo, he acts in a double capacity. His rights as trustee for the cargo interest, with respect to the vessel proceeded against may be much greater than his rights as owner of the injured vessel. And whether he is allowed to prosecute the suit entirely in his own name, or whether the owners or underwriters of the cargo intervene, for their own interests as they are entitled to do, and as they have done in this case against the New York alone, the court will enforce their claims to the full extent against that vessel if she is found in fault.

It should be borne in mind that the cause stands in this court against the New York alone. Her owners have not sought to compel a contribution to the interveners for the loss of the cargo by impleading the *Conemaugh* under the 59th rule, or otherwise. Had they done so, the case might, perhaps, be somewhat different. But as it stands, the right of the interveners to *full* indemnity from the New York is clearly recognized by the decision of the Supreme Court in the *Beaconsfield*, 158 U. S., 303, where it is said:

"Had no petition under the 59th rule been filed against the *Beaconsfield* by the French Company, the case would have stood quite differently, as there would have been no suit against the *Beaconsfield* upon which a decree could be rendered."

So here, as no petition has been filed against the *Conemaugh* by the owners of the New York to compel contribution, there is no suit against the *Conemaugh* "upon

which a decree can be rendered;" and, therefore, the decree as far as the interveners are concerned, must be against the New York for the entire damage done to the cargo.

See also

The Junlata, cited ante.
The Chattahooche, 74 Fed., 904.

The rights of the cargo underwriters to claim full damages against the New York are not affected by the terms of the bill of lading, which is set forth in the Record, p. 269.

Even if the bill of lading be such as to preclude the underwriters from recovering damages resulting to the cargo from the Conemaugh, the New York is not thereby relieved from her liability.

A shipper may make such contract as he chooses with the carrier. If the carrier is not a common carrier, they may agree that he shall not be liable for damages resulting from collision. But can such a contract be invoked by a stranger who is a wrongdoer, who negligently or recklessly runs the carrying vessel down and destroys the cargo? Under what principle of law ought *he* to be permitted to claim the benefit of such contract? The carrier may be a mere bailee, and the shipper may be willing to assume the risk of collision so far as such bailee is concerned; but this will not justify a third party in destroying the cargo, or limit his liability for such wrongful act.

The rule that a release of one joint tortfeasor is a release of all has no application to a case like this, and cannot operate to relieve the New York if both vessels are found to be in fault for the collision.

The rule has no application in courts of admiralty, which administer relief upon equitable principles; and there is no equity in the claim of the New York to be relieved from her liability even if the Conemaugh cannot be held for the damages to the cargo. We believe that no

case can be found which sustains the owner of the New York upon this point; and the absence of all authority tends to show that the claim has no support in the law. It is certainly contrary to the rule laid down by the court in the *Alabama and the Gamecock*, and in other cases, which expressly recognize the rule that in cases of collision resulting from mutual fault of the colliding vessels, the cargo owners have the right to pursue either or both, and recover full compensation from either or both, as they may elect.

The principle that a release of one wrongdoer operates as a bar in favor of the other wrongdoers is strictly legal—not equitable—and is confined to actions at law. It is based upon the principle that "the injured party has actually received satisfaction," or what in law is deemed the equivalent.

Cooley on Torts, 139.

As he can only have satisfaction once, if he accepts it voluntarily from one wrongdoer, it operates as a bar as to all. But it is believed that the principle is confined only to cases of "wrongs intended," where the several persons unite and act in concert in doing a wrong to another. It is doubtful if it applies in any case where the wrongdoers do not act in concert.

In 1 Jaggard on Torts, 345, it is said:

"The American cases recognize only satisfaction as a bar to suit against joint tortfeasors. When the cause of action is once satisfied, it ceases to exist. Where, however, there is a wrong in which several persons join without concert, the release of one is not the release of all. They are not, strictly speaking, joint tortfeasors."

And at page 212 it is said:

"Nor is mere similarity of design or conduct on the part of independent actors sufficient to con-

stitute such actors joint tort feorsors. There is a marked distinction between a tort and liability arising from a tort. The liability as between the plaintiff and the defendant may always be treated as several, but the wrong itself may be jointly done or severally done by the defendants. If it be jointly done—that is, in concert—the defendants are joint tort feorsors; if it be severally done—that is, independently, though for a similar purpose and at the same time—without any concert of action, they are several tort feorsors.”

It cannot be said that the New York and Conemaugh were acting in concert. They were not, therefore, strictly speaking, joint tort feorsors.

If the doctrine contended for by the owner of the New York in Court of Appeals is correct it would lead to this result, viz, that whenever the owner of one vessel is relieved of liability by operation of law or otherwise, the owner of the other vessel, if both vessels were in fault, would also be relieved. Such ought not to be the law.

When it is said that the release of one of several tort feorsors operates to discharge the other tort feorsor from liability, reference is usually, if not always, had to a technical release under seal. When anything else is relied upon, the question is always open as to the intention of the parties, which is to be determined by testimony and the surrounding facts and circumstances.

Ellis vs. Esson, 50 Wis., 138.

Whether settlement, or payment, or discharge of one of several tort feorsors shall operate as a release of the others, depends upon circumstances and the intention of the parties.

Duck vs. Mayeu, L. R., 1892, Q. B. D., 571.

City of Chicago vs. Babcock, 143 Ill., 358.

If the Court is free to distribute the loss arising from damage to the cargo "according to the relative faults of the guilty parties," then it would be simply just under the circumstances to allow the interveners to recover their entire loss against the New York; and as to them the decree of the District Court should be affirmed.

The fault of the New York is not only tacitly admitted by her answer and by the failure to produce her witnesses, but it was openly confessed in the court below, as shown by Mr. Goulder's affidavit (Rec., p. 203).

There are other reasons why the owners of the New York are not entitled to claim any deduction from their liability to the cargo underwriters, on account of the conditions in the bill of lading.

1. Because the point was not raised by any of the parties in the District Court, either by the pleadings, proofs or in any other manner.

2. The final decree of the District Court (Rec., p. 206) awarded to the underwriters the full amount of their claims against the New York, and no error was assigned by the owners of the New York to this part of the decree when they appealed therefrom to the Circuit Court of Appeals.

See Rec., p. 200.

3. Whatever rights the owners of the New York could *possibly* have had in this regard, they were waived by the stipulation entered into by proctors for the respective parties, which reads as follows:

"Inasmuch as there is *no question* at issue as to "amount of damages awarded by the decree of the "District Court in this cause, or as to the right of "the intervening insurance companies to share "therein *according to said decree*, it is, therefore, "hereby stipulated that in making return to the "appeal in this cause the clerk of the District Court

"may omit from the transcript of the record all proceedings had in ascertaining the damages of the libellant and intervening petitioners except the stipulation of the parties which fixes the amount of the damages to the propeller New York by said collision. And said District Clerk may also omit from said transcript copies of the petitions of the intervening insurance companies and all orders made by said District Court with reference thereto other than the final decree." (Rec., p. 213.)

This stipulation is an admission on the part of *all* the parties of the right of the interveners to recover the full amount awarded to them by the decree of the District Court if the New York was in fault for the collision.

The decree of the District Court awards to each of the insurance companies certain specific sums as their damages against the New York. (Rec., 206.) The stipulation referred to estops the parties from questioning the correctness of these amounts, and estops the owners of the New York from denying their liability for these amounts to the underwriters if their steamer was in fault. An examination of the record shows that no question was made in the District Court as to the rights of the underwriters on account of the bill of lading. It was first suggested at the argument in the Circuit Court of Appeals.

I submit that the decree of the District Court should be affirmed as to the claims of the underwriters.

F. H. CANFIELD,

Counsel for the Underwriters.

F. H. & G. L. CANFIELD,

Proctors.

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Supreme Court of the United States

THE UNION STEAMSHIP COMPANY
Respondent

THE UNION STEAMSHIP COMPANY
Petitioner

SUPPLEMENTAL BRIEF FOR RESPONDENT

H. C. WISNER
C. E. KREMER

*Attorneys for Respondent Union
Steamship Company*



IN THE
Supreme Court of the United States,

OCTOBER TERM, 1898.

THE ERIE & WESTERN TRANSPORTATION
COMPANY et al.,

Petitioners,

vs.

No. 277.

THE PROPELLER "NEW YORK", THE
UNION STEAMBOAT COMPANY,

Respondent.

STATEMENT.

The time under the rules of the court in which to prepare a brief in answer to the brief of petitioner is so short that we prepared a brief in advance, and in answer to the brief accompanying the petition for a writ of *certiorari*.

We supposed the case would be presented only upon the points made in the petition, but find that the whole case is made the subject of argument in petitioners' brief. We, therefore, present as aid to the court, a brief and argument, such as would be proper on a full argument of the case upon the facts, in the first instance.

Petitioners' proctors in their brief present no reason why the "Conemaugh" should escape liability, but make their greatest efforts to make liable the "New York," so that she may share the damages in this case.

It must be remembered that no witnesses were called on behalf of the "New York." The case rests entirely upon the testimony of the "Conemaugh."

It was upon libelants' showing of how the collision occurred that the courts have found and decided.

This fact seems to be a thorn in the side of petitioners' proctors. They seem to think that the "New York" withheld much valuable exculpatory testimony in the case, and that for this she should be condemned, and if possible found in fault.

To further increase the record in this case would add nothing to the evidence except to further emphasize the many faults of the "Conemaugh," which are now sufficient to condemn, and establish her faults and liability.

In considering the relative duties of the "New York" and the "Conemaugh," it is necessary to consider the place, time, and the circumstances under which these vessels were approaching with a view to passing each other.

The "New York" had signaled the "Burling-

ton," and saw coming toward her a number of red lights, which clearly indicated that they were upon vessels in tow of the one that she had exchanged signals with; the "New York" had before her the lights which at night, form an apparently unbroken line of lights across the river from shore to shore, to one approaching the City of Detroit. (Rec., 28, 29.)

First. The number of these barges it was unable to determine in the darkness.

Second. She could not determine how near they were, or how near they would come to the land while swinging around before they would draw out of the "New York's" way.

Third. The distance of the channel bank from the visible shore could not be determined in the distance and darkness.

Fourth. The "Conemaugh" could not determine accurately from astern of the barges their course, the manner of their swing, their proximity to the shore, or the location of the channel bank abreast of them.

These were the circumstances, and these were the obstacles which made a meeting of these steamers more or less perilous until they had been removed. The "Conemaugh" instead of waiting made the first mistake by running into that part of the channel used by up-bound boats.

The "New York" made no such mistake.

The evidence as to the width of the channel which was open to use is as follows :

Captain Miller, of the "Conemaugh," says three lengths or 750 feet (p. 18).

Captain Powrie, of the "Burlington," who selected the route, 1-4 of the width of the river, or 700 feet (p. 61).

Jordan, his mate, the same distance (p. 81).

Hogan, mate of the "Conemaugh," three lengths or 625 to 750 feet (141).

This is the testimony of the officers of the two steam vessels, men of proven intelligence and nautical skill. Then there is Jeans, master of the "Amaranth," 700 to 750 feet (87).

Now, against this we have Robert and Loomis Smith, masters of the barges "Wesley" and "Ferguson," May, seaman on the "Conemaugh," Errill and Davidson, seamen on the "Ferguson," and "Wesley" respectively.

Can there be any doubt upon this testimony where the preponderance lies ?

Does not the weight of the evidence establish that distance at 1-4 of the channel width or from 600 to 750 feet ?

The channel bank is admitted by actual measurement to be 235 feet (p. 81) from the water's edge, allowing nothing for the difference between the water's edge and the higher shore further back, which could be seen from the vessels that night.

This leaves the channel between the "Ferguson" and the channel bank or the navigable channel, as about 500 feet in width.

Now let us examine the testimony to see how far from the shore or the channel bank the collision occurred. It is true that some of the "Conemaugh's" witnesses say that the "Conemaugh" was almost on the bank when she was struck. This class of testimony is of little value in establishing an actual distance. It is open to some doubt because she was moving toward the bank at five miles an hour at least, and the bank was not visible, and it was dark. The witness, of all those who testified, best qualified to speak intelligently on this subject, is Captain Miller, and he says, (p. 19):

"Q. Can you tell the court how far you were from the channel bank when you struck? A. We were about one length, probably a little more.

Q. From the Canadian channel bank? A. Yes, sir.

Q. What did you do at the time of being struck, did you give any order to your engineer? A. Yes, sir; after he struck I gave him the long whistle to work her strong.

Q. How quickly did your bow touch bottom? A. I didn't feel that."

As the tendency is to get it too near rather than too far, this distance is probably between 300 and 400 feet.

Priest, lookout, on page 54, says he didn't notice when she went aground.

The collision then occurred at some point between a little more than a length of the "Conemaugh," say 300 feet at least from the channel bank, and the course of the barges 200 feet further west, and from this must be deducted the distance the "New York" passed the barges, or within the 200 feet left between where the "Conemaugh" was struck and the line of the barges.

The collision, therefore, could not have occurred in the place stated in the brief of petitioner, or as given on its charts.

The only tangible fault charged against the "New York" is that she ported and swung farther under this order than was necessary to clear the barges.

They admit (Brief, 101) that the master of the "Conemaugh" does not so testify. In fact, being interrogated on this point, he testifies (Rec., 188):

Q. *"What change of course did the "New York" make that was not necessary for her to make to come by those barges?"* A. *I do not know, sir; I was on my own boat at that time.*

Q. *You do not know that she made any change of course that was not necessary for her to make for that purpose, do you?"* A. *I do not."*

Petitioners attempt to establish a rank change of course by the "New York" to starboard and toward

the Canadian Bank, and that before she passed clear of the barges. In order to make this as rank as possible, they locate the barges well out in the stream and the collision close to the Canadian bank. These positions are not borne out by the testimony. The alleged maneuver of the "New York" is an entirely improbable one, and seems more so, if you assume that the "New York" was navigating unconscious of the presence of the "Conemaugh." It is then incomprehensible.

It is further improbable that a steamer like the "New York" which was holding her course unusually close to this line of barges, should in the darkness run with a hard-a-port helm directly for shore and toward a channel bank, the exact location of which could not be determined accurately in the daytime, much less in the darkness, and that too when practically clear of the barges. Why should she make such a change?

It was contrary to her former apparently careful management.

It was not to avoid the "Conemaugh," because they say she was not then seen, and if she had been, it would bring her into collision with her.

It was not to avoid the barges, because these were being passed safely.

It was not to avoid any other vessel, because there was no other vessel present.

It was not to avoid any obstruction, for the only one there, was the channel bank, and toward and not

away from this *they say* she was running full speed under hard-a-port helm.

It is, therefore, altogether an improbable movement and one that is not established by the proof.

Whatever testimony is offered here that the "New York" ported and ran over almost onto the Canadian bank of the river is unreliable for the reasons:

First. That those on the "Conemaugh" could not know, and, therefore, did not agree as to what did occur.

Second. The people on the opposite side of the river looking for a distance of half a mile into the darkness, could not see what was going on.

Third. They were in a position where the red light on the "New York" was absolutely shut out to them, because she was too far down the river, and they were practically *behind* her red light, until she swung it into view again while passing under the stern of the last barge.

(See Rec., 189):

"Q. *Then you can't recollect of any change in her heading until she struck you, from the time you passed the stern of the stern barge in the tow?* A. *No, sir; I can not.*"

Captain Miller, who best knew, because he was most interested, testifies that he does not know whether such a change was made.

Would he not have known if it had been made?

Would it not have been perfectly apparent to him?

The vessels were close together; he was watching the "New York"; he could see the whole of her; he knew the surrounding circumstances, and when under all

these he is not willing to say that she made a change, and such a change is altogether improbable, we must assume that no such change was made.

To establish that the "Conemaugh" could not have been over near the Canadian bank at the time she was struck, let us examine the evidence to see where she was just before or about the time she blew the alarm whistle, which preceded the collision but a few seconds.

This evidence will also demonstrate that she was not up above the tow, as shown by the charts of petitioner, but prior to the time of blowing the alarm whistle, she was and had been for some time, to the starboard of the last barge and within the bight of the tow, practically behind it and shielded by it.

In order to demonstrate that she was not up above as was shown by the charts of petitioner, but was always within the bight or above the line of the tow, we have collected the testimony upon this point.

Where, with reference to the line of barges, was the "Conemaugh" before and at the time she blew her third signal?

HUGH O. MILLER, master of "Conemaugh" (p. 39):

"Q. You stood on about the same length of time, I suppose, then you repeated your signal? A. Somewhere about the same.

Q. Making the third signal? A. Yes, sir.

Q. Hadn't you got clear of the barges by that time? A. No, sir.

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm? A. Yes, sir.

Q. He was then showing you both his side lights? A. Yes, sir.

Q. And you hadn't reached the course of the stern barge? A. Coming on to it then about that time."

GEORGE PRIEST, lookout on "Conemaugh" at time of collision (p. 46):

"Q. When you gave the danger signal on your boat, which was nearer to the Canadian shore, those dark objects, that is, the tail of the tow, or the 'Conemaugh?' A. The tail of the tow, as far as I could see."

JOHN A. HOGAN, second mate of the "Conemaugh" (p. 147):

"Q. The 'Conemaugh' had gotten under the stern of the rear barge at that time? A. No, sir.

Q. And it was before the 'Conemaugh' got to the stern of the rear barge that she blew the third blast of two whistles? A. Yes, sir."

FRED MAY, watchman of the "Conemaugh" (p. 56):

"Q. At the time of the alarm whistle, as it appeared to you, was he nearer the Canadian shore, the tail of the tow or the vessel you were on? A. I think the 'Conemaugh' was a little bit nearer the American shore.

Q. You mean to say the 'Conemaugh' had passed across the line of the barge before she blew the alarm? A. No, I didn't mean to say that.

Q. Then she didn't pass it before she blew the alarm? A. She might have been a little one way or the other, she was about abreast of it."

LOOMIS P. SMITH, master of "Ferguson" (p. 102):

"Q. When the 'Conemaugh' was blowing her whistles to the 'New York,' she was on your starboard hand astern, wasn't she? A. Yes, sir.

Q. And when she blew the alarm whistles, she had got under your stern? A. She was directly astern of me.

Q. And the collision occurred immediately after that? A. Shortly after that.

(104) Q. You say that she blew the 'New York' three separate signals of two blasts each? A. Yes, sir.

Q. And during all that time she was astern of your barge or on the starboard side of you? A. On the starboard side of me.

Q. As I understand you, it wasn't until she blew the alarm whistles that she got from under your stern? A. She was passing across my stern.

Q. At the time she blew the alarm whistles? A. Yes, sir; up the river and astern of me."

DOMINICK JEANS, captain of "Amaranth" (p. 87):

"Q. What did you see of the 'Conemaugh?'
A. When I first noticed her, I saw him coming down the river; I thought he was a little in the center of the river, or a little more on the American side; and I saw him after we began to turn around starboard his wheel; I thought he was going under our stern. I watched him closely, and I saw his green and red light and mast head light along, until he came to sheer on the Canada side, then I lost his red light and I saw his green light."

The District Court also found that when the "Conemaugh" blew her alarm whistles she had just crossed the wake of the stern barge "Ferguson."

The "Conemaugh" must have been close to the "Ferguson" because she only had 700 feet of space to pass over to reach her from the time she began to blow her signals, and she was running more than twice as fast as the barges, and in the beginning much more than that, so that by running 500 or 600 feet the "Conemaugh" would be within 300 feet of the barges at the time she crossed the stern of the "Ferguson," allowing for the speed of the barges.

That with the "Conemaugh" behind and to the starboard of the barges, virtually hedged in and protected by them, against the "New York," passing under her stern was an easy and safe maneuver, and

this must be perfectly apparent. There was no obstacle in her way to prevent her doing so.

Capt. Miller admits that if he had ported instead of starboarding, after blowing the third signal, he then would have passed on the port side of the "New York." He was at that time on the port side of the "New York," seeing only her red light.

He was not clear of the line of the barges. He was still west of them, or just behind the "Ferguson," and had only just steadied from, or was still swinging under, a port helm.

If he had continued he would have remained on the starboard side of the "Ferguson" out of all danger from the "New York," and by simply slowing up (a possible delay of a minute) he would have found himself clear of both the "New York" and the "Ferguson."

"Q. *If you hadn't steadied from the port helm, you think you would have swung down on the port side of the 'New York?'*" A. *Yes, sir.*" (Rec., 40.)

Why didn't he do this?

His excuse is that having blown two blasts he proposed to clear or collide in accordance with that signal.

Is this an excuse for adopting a dangerous mode of passing, as against a safe one?

Is it a sufficient excuse for violating the directions of the Inspectors?

It must be remembered that during all of this time the "Conemaugh" was running towards and into that part of the channel or fair way to which the "New York" had the greater right.

The master of the "Conemaugh" is the only witness who says that he had, while blowing both the second and third signals, both lights of the "New York" in view.

The most he could claim for his position as against the "New York," therefore, was that she was directly end on to the "Conemaugh." He had to cross her bow at some time and place before he could pass her. When and where did he expect to do it?

Or did he expect the "New York" to change to starboard to help him out of this difficulty? A difficulty of which he was the author. Why didn't he get onto the starboard side of the "New York" at once when he first saw her two lights? Why didn't he get

the steamers into such positions that they were showing green light to green light? The positions which they must take before they could safely pass starboard to starboard.

According to the libellants he had a clear channel of at least 600 feet to the eastward of the "New York" to do it in.

Why did he wait?

If he could not do it, was it because the course and heading of the "New York" was such when the second signal was blown that it did not leave him room?

If so, then she could not have been showing him both side lights, but was showing him only her red light, and he must wait until she should starboard to bring both her lights in view, and this would not be until she was clear of and passing under the stern of the "Ferguson." If this was so, he was navigating his steamer so that the "New York" must avoid him and not he the "New York." Is not this the plainest violation of Rule 19 and Article 16?

The courses and positions of the "Conemaugh" and "New York" demonstrate that Capt. Miller could not at any time after his first signal have seen both lights of the "New York," and hence it is that not a single witness from the "Conemaugh's" decks agrees with him as to the appearance of the "New York's" lights.

Priest says (45) that he lost the red light before the second signal was blown, and when the third was blown lost the red and saw only the green light, and when the alarm was blown saw only the red, and (46) when the "New York" was coming towards the third barge he saw only the green light, and when she came on to them was showing both lights.

Hogan (139) says he saw both lights of the "New York" when the second whistle was blown, and when the third was blown saw only the red light and no green light on the "New York." (140.) When he saw both lights the "New York" was a mile away in the middle of the river, and when the third whistle was blown she was somewhere around the third barge ("Amaranth"), and when the alarm was blown "New York" was somewhere abreast of the last barge ("Ferguson"). (141.) Before she struck he saw "New York's" both lights.

Crowe, fireman of "Conemaugh," says (175): After first two whistles were blown "New York" in the middle of the river quite a ways below the tow showing both lights; after the second signal saw only the "New York's" red light (175); when the alarm was blown "New York" somewhere around the last barge showing her red light.

May and *Kelly*, the only other witnesses on the "Conemaugh," did not see the "New York's" lights until just before the collision.

First signal:

Miller first saw red light and signalled the first time. Crowe saw both lights. Priest saw both lights. Hogan didn't see her then.

Second signal:

Miller saw both lights three-quarters of a mile away. Hogan saw both lights a mile away at that time. Priest saw only the green. Crowe saw only the red light.

At the third signal:

Miller saw both lights.
Hogan saw only the red light.
Priest saw only the green light.
Crowe did not hear third signal.

When the alarm was blown:

Miller saw only the red.
Hogan saw only the red.
Priest saw only the red.
Crowe saw only the red.

The witnesses do not all agree except upon the last showing of the red light of the "New York."

What a confusion!

The physical facts, therefore, ought to control as against such evidence, and they show that after the first signal the two lights could not have been seen from where the "Conemaugh" was.

Hogan saw them after the second signal, but they were a mile away and he has confused the first with the second signal, as she must have been nearer when that signal was blown and was about a mile away when the first was blown.

At best the situation was complicated and far from clear, and during all of this time the "New York," refused to accept the offer of starboard to starboard or two whistle signal from the "Conemaugh," so that there was a condition of affairs which required the utmost caution, and the strictest observance of the rules of navigation, on the part of the steamer "Conemaugh."

To meet this situation Capt. Miller cut the Gordian knot of the difficulty by cutting across the line of the protecting tow and hurling his steamer across the

course of the "New York," and ringing up his engine and starboarding his helm, he brought about the collision and subsequent loss.

The Mary Powell 92 U.S. 408

The "E. A. Packer," 58 Fed. Rep., 251:

This was a collision in New York harbor between a barge in tow of the tug "Packer" and the barge "Atlanta," in tow of the tug "Wolverton," resulting in the sinking of the "Atlanta." The "Packer" had the "Wolverton" on her starboard side. The "Packer" starboarded across the course of the "Wolverton" and her tow.

The court held the "Packer" at fault for violating Rule 19 and Rule 2 of the Inspectors.

The Circuit Court of Appeals, on page 255, says:

"If an effort by starboarding to cross the bows of an approaching vessel would have been 'attended with great danger' if attempted at night or in thick weather, it would seem to be equally dangerous when attempted in the light of a controlling rule of navigation which clearly advised such approaching vessel that such effort was precisely the one thing which would not be attempted, and directed that vessel not only to keep her course, but even to assist a diametrically opposite maneuver by herself porting. That the supervising inspectors have made rules applying to navigation in the waters where these vessels were is now proved. That one of those rules covers the situation in which they found themselves at sighting is plain. Their authority to make such rules was not disputed on the argument; nor on the point involved here is there any apparent inconsistency between them and the rules of Section 4233. The rules prescribed

by authority, so far as they apply, constitute the law by which courts must test the navigation of vessels when brought in question before them."

The "Packer" in this case was guilty of the fault with which we charge the "Conemaugh."

Her conduct was more excusable than that of the "Conemaugh," because it appeared that a local custom among navigators of the waters that she was in, in part, at least, justified the maneuver of starboarding.

In the case at bar there was no excuse whatever. There was no local custom and no such conditions as justified a departure from the directions of Rule 2.

This collision is another illustration of how much safer it is to follow the rules than to adopt a course in violation of them.

It is rather difficult to understand how petitioners can "suck comfort" out of the authorities laying down the rule of law that a vessel which is *primarily* in fault for a collision can not shift the consequence in part upon the other vessel.

Which of these steamers was primarily in fault? The "Conemaugh" first proposed the course which would throw her across the "New York's" course, and which was in violation of the Inspector's Rule, and the "End on" rule. The "New York" in no way interfered with this. The "Conemaugh's" duty was active, that of "New York" passive.

In adopting the course of crossing the "New York's" course she was violating the rules. She proposed it a second and third time, and again and again violated the rules. At each successive proposition the risk of collision increased and yet at the time of these several proposals there was nothing for the "New York" to do different from what she was doing, and had been doing, and Capt. Miller found no fault with her maneuvers. They did not confuse him, or change any of his ideas of passing her.

Her duty was to hold her course and speed. Such is the law.

The acts of 1890 and 1895 by enactment have followed the decisions of the court on this point in the case of the "Britannia."

In the case of the "Delaware," 161 U. S., 459, at

467, Mr. Justice Brown says, referring to the Inspectors' Rules:

"These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on."

Under the rules of 1895, now governing vessels on the lakes, there are provisions for the use of the whistle for passing steamers, but there is this exception: "But the giving or answering a signal by a vessel required to keep her course shall not vary the duties or obligations of the respective vessels."

Suppose the "New York" had answered with two blasts each signal of the "Conemaugh" by blowing two blasts, this would not change her duty of keeping her course, or release the "Conemaugh" from her duty to keep out of the way.

The "Conemaugh's" persistency in violating the rule did not release her from her legal obligation.

So that hers was the primary fault or series of faults, and her adherence to them by starboarding across the "New York's" course was the approximate and direct cause of the collision. Had the "Conemaugh," even after she had three times proposed a violation of the rule, followed it by porting instead of starboarding, this collision would not have occurred. To exonerate her from liability she invokes the old and time-worn defense of a change of course, a defense which Judge Grier of the Supreme Court

once characterized "as always improbable and generally untrue."

The rule should be applied to the "Conemaugh."

Upon her is the burden of proof in this case.

The libellants must show by "clear proof the contributory negligence or fault" of the "New York."

The Clarion, 27 Fed. Rep., 128.

It was the duty of the "Conemaugh" under either rule 18 or 19 of the Revised Statutes, or the International Law, or the Canadian Statute, to pass the "New York" by porting her helm, and passing port side to port side.

Under the customs of the river supported by Article 25, of the Regulations of 1885, it was her duty to keep on that side of mid channel which lay on her starboard side.

The master of the "New York" had a right to rely upon the "Conemaugh's" obeying the law.

While it is now conceded that these steamers were

meeting on crossing courses such a relation was liable to cease at any time as these vessels approached each other and their courses became parallel.

When article 19 ceased to operate as the governing rule, article 18 would immediately take effect, and under this it became the duty of the "Conemaugh" to pass port to port. Approaching as she was the "New York" could not know when the change would be made, for the "Conemaugh" was in a position to make it at any time before she or the "New York" would pass the last of the barges.

Following the tow as she was she could not well be distinguished from one of the barges. The latter's spars and rigging, foreshortened in appearance to the "New York" as she approached, made the five or six mast with their rigging a nearly solid mass which could and doubtless did obscure the "Conemaugh" from view. Her masthead light could easily be taken for the bright light of a barge used for the latter to steer by, so that it would be difficult to distinguish the "Conemaugh" from a barge, and following the tow as she was, there was little danger from her as long as she followed the line of, or remained within the bight of the tow.

That she was behind the tow is so clearly established that it is unnecessary to again cite the testimony that supports this proposition.

Captain Miller says that while blowing the two last signals of two whistles he had in view the green and red lights of the "New York." The "Conemaugh," therefore, must have been during that time upon substantially an "end on" course toward the "New York;" otherwise both vessels moving, one or the other of the "New York's" lights would have been shut out.

The "Conemaugh" would therefore show the "New York" either both or only the red light. If both, the "New York" could not know which side of her the "Conemaugh" intended to pass her on, although in that position it would be her duty to port under the "end on" rule. If only her red light was in view then it would indicate that she intended to pass port and port.

So that in either case the port helm was the rule and the hope.

It would have been such an easy matter for the "Conemaugh" to have "hugged" the Canadian bank when she first starboarded. She would then have been so close to shore, and show her green light

alone so plainly to the "New York" that there would have been no doubt as to her course and heading. The "New York" so far away would not have interfered with such a maneuver.

Why didn't the "Conemaugh" do this?

Why did he follow up the tow?

Was he too afraid of the Canadian shore?

He says there was so much room there for passage. Why did he not take some of it? The "New York" only required from 50 to 100 feet in which to pass the barges. He could have all the remainder, and he says there was 700 or 800 feet of it, all good clear water.

Is it possible that he looked to the protection of the tow?

If not, why did he linger there? Lingered there, why did he not continue to do so?

If it was safer when she was far away, it was still safer when she came nearer.

Why did he starboard directly towards all the danger, where he was without promise, and where he ought also to have known, without hope?

Occasionally there is found some expression of a witness which tends to support by itself the position claimed by the Petitioner. This evidence is so thoroughly contradicted by other witnesses and by the physical possibilities and probabilities, that where all are *the one party's witnesses, and that party having the burden of proof*. We submit the fact, as claimed by that party, can not be found against the presumptively innocent one. The "Conemaugh"

chose the wrong course, blew the wrong signal a first, a second and a third time. All her signals were unanswered. She had no permission to violate the law, the rule and the usage. Stubbornly clinging to the series of errors she ended the difficulty by an alarm signal and a collision. For this she was held liable and justly so.

H. C. WISNER,

C. E. KREMER,

Proctors for Respondent Union Steamboat Co.

W O Johnson, of course

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 277.

THE ERIE & WESTERN TRANS-
PORTATION COMPANY, et al.

Petitioners.

vs.

THE UNION STEAMBOAT COM-
PANY, Claimant of the Propeller
"New York."

Respondent in Certiorari.

Certiorari to the U. S. Court
of Appeals for the Sixth
Circuit.

BRIEF OF PROCTORS FOR RESPONDENT.

The petition in this case does not state the facts of the collision as they were presented to the District and Circuit Court of Appeals. The case is now presented in a different form, both as to the law and in some respects as to the facts, and we, therefore, take the liberty of making a concise and brief statement of facts in our brief before we proceed with matter in argument.

STATEMENT OF CASE.

Case of collision on October 21, 1891, in Detroit River, just below the City of Detroit, between petitioners' steamer Conemaugh and respondent's steamer New York.

Conemaugh's length, 250 feet; beam, 35 feet; depth, 15.3.

New York's length, 270 feet; beam, 37 feet; depth, 16.2.

Width of river at locality of collision between channel banks, about 2,300 feet; between shore lines, about 2,800 feet.

Current of river, about $2\frac{1}{2}$ miles per hour; weather clear; starlight, no moon; slightly hazy, as is usual at that time and season.

A little below, directly opposite the place of collision, is located a coal station, known as "Smith's Coal Dock," where vessels are accustomed to procure their supplies of coal.

These coal docks are about two miles below Fort Wayne, the lower city limit.

On the evening in question, before and at the time of the collision, as referred to in the libel, answer and testimony, the steamer Burlington, with a tow of four lumber-laden barges, bound down, was "rounding to" in the river to take coal at "Smith's dock."

This steamer and tow was in the order and of length as follows:

Burlington	Length	145	feet.
Tow line	"	600	"
1, Barge Wesley	"	150	"
Tow line	"	500	"
2, Barge Republic	"	148	"
Tow line	"	500	"
3, Barge Amaranth	"	148	"
Tow line	"	500	"
4, Barge Ferguson	"	135	"
<hr/>			
2,826 feet.			

The Burlington and her tow was, in length, about the width of the river from shore to shore; and in running down preparatory to "rounding to" she had taken her tow well over towards the Canadian shore, estimated by her

captain as three-quarters across from the American shore.

The speed of the Burlington and tow while "rounding to" was at the rate of about four miles an hour, including two and a half mile current of the river; this makes the speed of the two rear barges a little greater than the current or about three miles.

The steamer Conemaugh, owned by petitioner, bound down, on a voyage from Milwaukee, Wis., to Erie, Pa., and the New York, owned by appellant, bound up, on a voyage from Buffalo, N. Y., to Milwaukee, Wis., came into collision about 8 o'clock p. m. on said 21st of October, 1891, near the Canadian bank, and, as stated, a little above directly opposite the "Smith coal docks," by which the Conemaugh was sunk; the Erie & Western Transportation Co., her owner, filed its libel against the New York for the sum of \$70,000 as her damages on account of the collision.

The libel alleges: "Third." "On the American side of the Detroit River, a little below the River Rouge, was and is a coal dock known as "Smith's Coal Dock." Between 7 and 8 o'clock p. m. of said day, the weather then being clear and fine, the Conemaugh was proceeding down the Detroit River to the American side of mid-channel, having hauled some to starboard to avoid some piles (Kasota) driven in the channel, and when a half or three-quarters of a mile above the said coal dock she received a signal of two blasts from a steamer which, with four barges in tow, had theretofore been going down the Canadian side of the river, and was then rounding in and up to and was near the said coal dock, exhibiting her mast head and green lights to the Conemaugh."

"The Conemaugh's engine was at once checked, and remained checked until after the time of the collision hereinafter stated, her helm starboarded, and she answered

with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was 'rounding to' and which then stretched out in the river towards the Canadian side.

"The Conemaugh then made the lights of a steamer, which proved to be the said propeller New York, then down the river below the said tow, and coming up so heading towards the Conemaugh and on such a course that the Conemaugh as she was preceding, would cross the New York's course before the New York could reach the point of intersection of the two courses.

"The Conemaugh at once blew to her a signal of two loud and distinct blasts of her whistle. Not receiving a reply thereto, the Conemaugh promptly repeated the signal of two blasts. To this second signal the New York did not reply, and again the Conemaugh blew a two-blast signal; when the New York, which had all the time been coming rapidly up the river, still without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over towards the Canadian shore; whereupon the Conemaugh blew alarm whistles and hard-starboarded her helm.

"Notwithstanding there was ample room, had the New York properly approached and had she been properly handled, for the Conemaugh and the New York to have safely passed each other and the tow in accordance with the signals of the Conemaugh, the New York first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on at full speed and with her stem struck the Conemaugh with tremendous force on the starboard side, abreast the Texas, and almost immediately the Conemaugh struck the Canadian bank of the river and filled and sank."

The New York was seized under process issued upon said libel and bonded in the sum of \$70,000 by the Union Steamboat Company as claimant.

The answer filed to this libel states:

"That on the said day (October 21), between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh, in the Detroit River, below the Town of Sandwich, on the Canadian side of the river. That before and at the time of the said collision the propeller New York was bound up said river, and when nearing a point in said river below where the River Rouge empties into the Detroit River, a steamer with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's Coal Dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around.

"To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge.

"When the New York had arrived at a point abreast of the last barge in tow a signal of two whistles was heard, but being unable to see any vessels, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to pass safely between her and that bank.

"The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern. While passing under the

stern of this barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than 100 feet away.

"The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm.

"A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side, was swung by the Conemaugh nearly alongside.

"That at the time the New York passed under the stern of the barge she was not more than the length of herself from the Canadian bank; that no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a maneuver was attempted a collision could best be avoided by swinging clear under a hard-a-starboard helm."

On February 24, 1892, by leave of Court, the Union Steamboat Company filed its cross-libel against the Conemaugh.

The case was tried in both courts upon proof made by libellants, as the respondents called no witnesses and offered no proof.

BRIEF.

It is not disputed in this case that the Conemaugh and New York were under steam; were crossing so as to involve the risk of collision; and that the Conemaugh had the New York on her own starboard side.

This is the allegation of the libel, and the effect of all the testimony.

Record, 2.

The petitioners' counsel assumes that as this collision took place on the Canadian side of mid-stream of the Detroit River, the laws of Canada must govern this case, or in lieu of being successful in that claim; then the rule of law to follow shall be that known as international rules and regulations as prescribed by Act of Congress of 1885; while both the District Court and the Circuit Court of Appeals were governed by the Revised Statutes of the United States, Sec. 4233, and rules of the Supervising Inspectors.

This last mentioned law, Sec. 4233, is guided in its application by *Inspectors' rules not favorable to petitioners*, while the other mentioned laws are not so guided.

The general rule of navigation of all these is:

"If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other."

U. S. R. S., Sec. 4233, Rule 19, p. 823.

U. S. Stat. at Large, 441, Act Mar. 3, 1885, Art. 16.

R. S. of Canada (Exhibit Record, 259, 262 act 16).

It is clear, therefore, that, in this case, whichever of these rules shall be found to have been the governing rules at that time, it was the duty of the Conemaugh to keep out of the way of the New York. And it was the correlative duty of the New York to keep her course and speed.

It is most essential that, before this court shall attempt to consider this case upon its merits, which law or code of rules governed the navigation of the boats at the time of the collision shall be definitely ascertained.

As aid to the Court, counsel for the New York have prepared and do present a chart of the collision, carefully and as accurately as possible prepared from the testimony, upon a scale of 100 feet to one inch. The testimony used was solely that of petitioners' witnesses, there having been no witnesses called by the New York in this case. (This chart shows all the vessels at all times during the run from their first position *at which they appear brown in color*. This general chart is No. 1, the individual chart of this position being No. 2.)

This chart was constructed by locating the Conemaugh abreast of the Kasota spiles, 250 feet inside, where her master locates her, when he received and answered the signal from the Burlington. By locating the Burlington by the testimony when she signalled the Conemaugh, and her four tow barges with tow lines stretched to scale lengths, and in such position as the witnesses described. The New York was located (first having exchanged signals of one whistle with the Burlington) where the master of the Conemaugh places her.

These boats all appear on the chart as *brown in color*, and starting at these positions with the speeds of each; the Conemaugh from $9\frac{1}{2}$ to 10 miles, diminishing to about 4 to 5; the New York 8 to 10 miles maintained; the Bur-

lington and tow about 2 miles speed; and the current of the river $2\frac{1}{2}$ miles, they proceed on their proper courses until they reach the relative positions shown on the general chart as black and white line. (Separate Chart No. 3.)

The Conemaugh, upon exchanging a signal of two whistles with the Burlington, put her helm hard-a-starboard and swung across the river, (See Chart No. 3), until she picked up the stern barge of the tow, when her master gave the order "Steady," then "Port a little and follow that tow up" (pp. 112, 115), under which she swung to starboard (See Chart No. 3), and while so doing saw the lights of the New York and gave her a blast of two whistles.

The Conemaugh continued swinging under her ported helm, following the tow down with the current and her own speed, directly in line with the barges, who, on account of the current, were swung into the course of the New York, so that she was compelled to port a little and swing slightly to starboard in order to clear them. (Record, 87, 93, 98.) (See Chart No. 4.)

The tracks of all the vessels up to this position and just as the New York was about porting to make this slight change, appears on general chart colored blue. (Individual Chart No. 4.)

From this position the Conemaugh continued swinging under her "port helm to follow the tow around," until she exhibited to the two stern barges both her side lights (Rec., 89, 97, 106), on which course she steadied and continued exhibiting both those lights, until she starboarded and sheered towards Canada and across the course of the New York (Rec., 39-40, 87, 148), which was after the New York had steadied to run down parallel with and clear of the courses of the two rear barges and from 50 to 75 feet away from them and about abreast the stern barge. (Rec., 95-98.)

This position of the boats, and the courses run until the sheer to port under the starboard helm of the Conemaugh, caused the collision, appears on this chart as colored red. (Individual Chart No. 5.)

It was at about this time when the Conemaugh blew the alarm whistle (Rec., 18), starboarded her helm and ran to cross the bow of the New York. She blew the alarm when just astern of the rear barge. (Rec., p. 102.)

The New York continued about on a parallel course with the two rear barges, from 50 to 100 feet away from them (Rec., 87, 89, 98, 102, 158), until just as she reached the stern barge, when she heard two blasts of a whistle from off her port hand, but seeing no vessel in that direction from which such whistles could have come, paid no attention to them. Almost instantly though she heard the alarm of the Conemaugh and saw her swinging across the New York's bow under starboard helm; the New York had already starboarded to pass under the stern of the rear barge, and while swinging under a starboard helm, struck the Conemaugh crossing her bow. (Rec., 19, 58, 141, and answer.

The collision took place just astern of the last barge (Rec., 102, 119, 133), and about 300 feet from her (Rec., 87-88, 89, 141-142, 148-149). This condition is shown by individual chart No. 6, colored white.

We present with this brief, on a smaller scale, a copy of these charts.

Counsel for petitioners asks as the first important question presented in this case:

1. "Do the laws of the United States and rules of navigation prescribed by the Supervising Inspectors have any

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extra territorial effect; and do they apply in cases of collision between American vessels when navigating the waters of the Dominion of Canada, and beyond the territorial limits of the United States?"

Both the Conemaugh and the New York were American vessels. When they sighted each other both were navigating in Detroit River on the American side of said stream.

The New York was compelled to take the Canada side by the presence of the Burlington and tow, and her obligation to keep her course and speed as to the Conemaugh; the Conemaugh sought the same side only because of her desire to avoid delay. She had put her starboard side to the New York, whose port side light she saw; "they were on crossing courses involving risk of collision;" the Conemaugh was bound to keep out of the way; the New York must maintain her course and speed.

The Conemaugh had blown two whistles twice to the New York while on the American side of said stream.

Capt. Conemaugh, Record, 17-35.

Hence the maneuvering of these vessels to pass, really commenced when both were in American waters, at a time (which counsel cannot deny) when the R. S., Sec. 4233, and Supervising Inspectors' Rules, furnished the rule of the road for them to obey.

These rules having attached to said steamers, continued to be obligatory up to the time the Conemaugh blew the alarm signal, and starboarded across the bow of the New York, when both were thereby put in extremis.

N. Y. L. & U. S. Mail S. S. Co. vs. Ramball, 21 How., 372-384

The Johnston, 9 Wall., 146-153.

The Wenona, 19 Wall., 41, 52.

The Breakwater, 155 U. S., 252, 264.

In all probability neither master knew anything of the law of Canada; neither exhibited any knowledge of it.

The libel does not mention the law of Canada; it was not referred to during the trial of the cause, nor in the first decision (53 Fed. R., 553) of District Judge Swan, by which he held both steamers at fault. The District Judge, in referring to the Supervising Inspectors, says: While Rule 19 is absolute, that the steamer having on her starboard hand another, whose course she is crossing, must keep out of the latter's way, it does not define the course to be pursued to effect that end. To diminish still further the risk between steamers thus approaching, the supervising inspectors, under congressional authority, adopted Rule 2 of the Pilot Rules for the lakes and seaboard, prescribing that such steamers "shall pass to the right of each other as if meeting head to head or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified." In the conditions to which it applies, this rule is to be read into Rule 19 of the Steering and Sailing Rules (Rev. St. U. S., par. 4233). Yet, as declared by the inspectors themselves, it is not a rigid and invariable regulation, but is "to be complied with in all cases, except when steamers are navigating a crowded channel, or in the vicinity of wharves." As it does not absolutely impose on the steamer having another on her starboard hand, the duty of porting under all circumstances, it is not inconsistent with the steering and sailing rules. These steamers were navigating in a crowded channel, and that fact exempts the Conemaugh from the obligation to port under Pilot Rule 2.

Petitioners, evidently, to be freed from the burden of explaining the violation by the Conemaugh of inspectors' rule, referred to in the opinion of the District Judge above quoted from, made a petition for a rehearing, claiming the collision should be governed by the Act of 1885

(Vol. 23 of Statute, Chap. 356), which, like the Canada rule, does not require the burdened steamer to port in keeping out of the preferred steamer's way.

The trial of this case in the District Court was concluded March 2, 1892, and up to November 3, 1892, nothing had been said about the Canadian Statute. Counsel in his affidavit says, "On that date it was introduced into the case," with a motion for rehearing (Rec., 254), and in the second opinion of the District Judge, filed May 16, 1895, the Canadian law is not referred to.

I submit, therefore, that questions 1 and 2 are not pertinent here, as this collision had its inception within American waters, and although the vessels ran across the line before colliding the rule at inception on the American side of that line continued to the end of the maneuvering.

2. The next question presented by petitioners' counsel is, "Was this case governed by the act of March 3, 1885?" Counsel's endeavor here, is again to secure the elimination of inspectors' rule which was violated by the *Conemaugh*.

The act of 1885, referred to, locates the waters in which it shall be the rule of navigation "*as upon the high seas and in all coast waters of the United States,*" and excepts its application to *vessels navigating within the harbors, lakes and inland waters of the United States.*

This act evidently was intended to apply only to salt sea or ocean navigation, and the exceptions clearly exclude from it the Great Lakes. Had Congress intended its application to the Great Lakes and connecting waters, common reasoning would lead us to suppose that the Act of February 8, 1895, would not have been passed.

The Court of Appeals had this question before it in the *North Star*, 62 Fed., 73, and took the same view, holding to the R. S., Sec. 4233.

Such was the rule governing the navigation of the waters of the Sixth Circuit at the time of this collision.

The *North Star*, 62 Fed. R., 73.

The answer to this question therefore must be: The Act of 1885 did not supersede Sec. 4233 of the Revised Statutes and Rules of Supervising Inspectors.

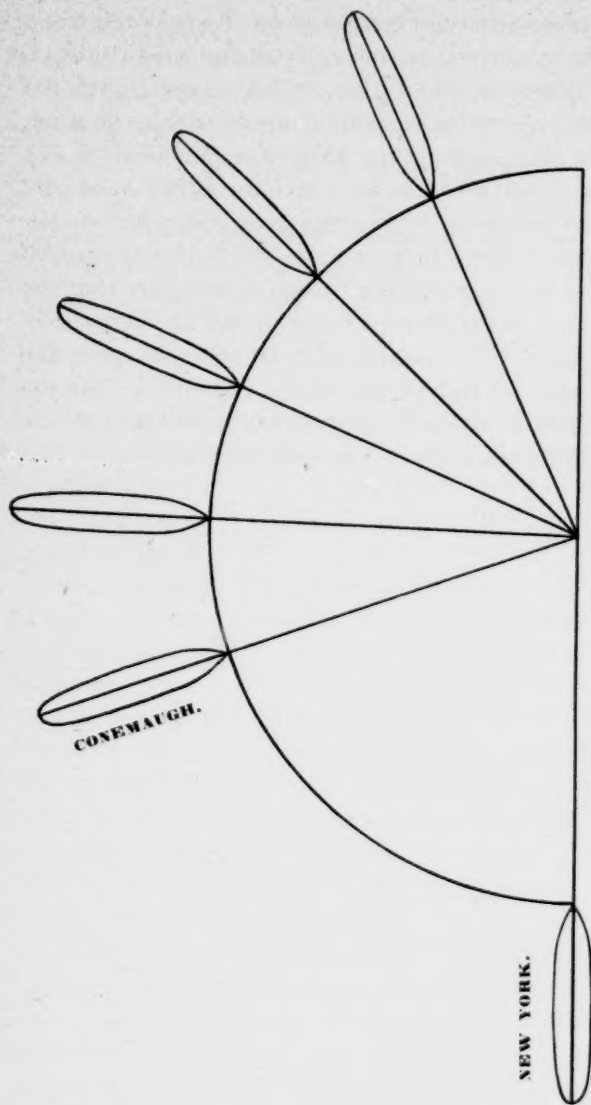
3. Petitioners' next question (Brief III), "Has the Circuit Court of Appeals in this case properly construed Inspectors' Rule No. II.?" "As already stated, that Court held, that under this rule it was the duty of the *Conemaugh* to port and go under the stern of the *New York*."

Counsel cites the rule, "When steamers are approaching each other in an *oblique* direction, as shown in the fourth situation put forth," etc.; and contends that the word "oblique" is not *synonymous* with the word "*crossing*" as used in Rule 19, Sec. 4233, Revised Statutes.

"If two vessels are *crossing* each other so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

At page 14 of his brief, counsel declares, with reference to this collision, "The *New York* and *Conemaugh* were on crossing courses so as to involve risk of collision," his contention being that the *New York* and *Conemaugh* were not *approaching* each other as indicated in the diagram; they were on *crossing* courses, the *Conemaugh* going down the river and the *New York* going up the river." Counsel's position is not sound. It isn't a question where the vessels were going. The material inquiry is, How

were they going, relatively, to each other? There are but two positions in the navigation of two vessels relatively to each other, covered by the rules of the road (Rule 18, Rule 19). One when on parallel courses to each other, the other when on *crossing* or *oblique* courses with each other, and when they are approaching *so as there shall be risk of collision*; they must be approaching either head and head on, or one must necessarily have the other on her own starboard side. In both cases the helms are ported to pass, unless circumstances render it necessary that the preferred one, under Rules 19 and 23 and the Inspectors' Rule II., may, if necessary, port in order to give the burdened steamer more room for her maneuver. The following diagram explains the possible positions of the vessels approaching under the fourth situation.



INSPECTOR'S RULE II. DIAGRAM. FOURTH SITUATION.

If not *approaching* on *parallel* courses they are within situation IV.

The objection of counsel to the validity of Inspectors' Rule as against Rules 19 and 23, Sec. 4233, has been answered in the following cases, affirming the validity of the rule, and in no case sustaining counsel's position:

The Johnson, 9 Wall., 146, 153.
 The Grand Republic, 16 Fed. Rep., 427.
 The B. B. Saunders, 25 Fed., 727 (731).
 U. S. vs. Miller, 26 Fed., 97-98.
 The John King, 49 Fed., 400.
 The E. A. Packer, 58 Fed., 251.
 The George S. Schultz, 84 Fed., 508.

The common law rule of the road at sea, before rules of navigation were provided by legislation, was the port helm or right hand rule, that the burdened vessel of two vessels meeting on crossing courses should port her helm and pass astern of the privileged vessel.

This rule was adopted by the law-making power, and has been the rule ever since, and is the rule to-day, whether declared by Inspectors' Rules or not.

The Rhond, 8 App. Cas., 549, 555.
 The Columbia, 10 Wall., 246.
 The Britannia, 153 U. S., 138.
 The Delaware, 161 U. S., 459.

The language of the Supreme Court in the case of the Delaware, 469, contemplates such to be the rule of the road by this forcible language:

"The cases of the Britannia, 153, U. S., 130, The Northfield, 154, U. S., 629, must be regarded, however, as settling the law, that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her *by porting*."

Therefore the answer to this question must be, The Circuit Court of Appeals has properly construed Inspectors' Rule 2.

4. The question now is as to the duty of the New York to answer the Conemaugh's signal of two blasts.

The two steamers were approaching on crossing courses so as to involve risk of collision, and there was a demand for maneuvering in accordance with the rules of the road; it is conceded that their relative movements were such that it was the duty of the Conemaugh to keep out of the way of the New York, and correlatively the duty of the New York to keep her course and speed, subject to the qualifications of Rule 24, Revised Stat., 4233. While in that position and at the distance of about three-quarters of a mile apart, the New York having already entered into a passing agreement with the Burlington and her tow; it being in the night, the Conemaugh, in violation of her duty under the Inspectors' Rule, signalled the New York that she should cross her bow, and repeated that signal twice. It being the New York's duty, first, to keep her obligation with the Burlington, which demanded of her possibly a port helm, while the demand of the Conemaugh was from her a starboard helm. The Inspectors' Rule duty of the Conemaugh to port and pass under her stern, if obeyed, made navigation between the two steamers safe and simple; the Conemaugh had but to port her helm, run up into the bight made by the line of the Burlington and her tow, and check down but a moment until the New York got by her; the New York had but to keep clear of the tow, maintain her course and speed. The Conemaugh did in fact "port and follow the tow round," until she exhibited to the New York and to the barges in the tow both

her lights, while at the same time she was deceiving the New York by blowing her two-whistle blasts.

Testimony of Capt. of Barge Amaranth.

Testimony of Capt. of Barge Ferguson.

Had the New York replied to the whistles of the Conemaugh by one blast of her whistle, she would have violated Inspectors' Rule III. (see Circular, Petitioners' Brief, page 15) by giving a cross signal; if she had replied by two blasts of her whistle she would have assented to a violation of the rule which required her to keep her course, and which assent she was under no obligation to give, but, on the contrary, prohibited by rule from giving.

Under the authorities she did right in ignoring the proposition of the Conemaugh.

The Delaware, 161 U. S., 467.

The Geo. S. Schultz, 84 Fed. R., 508.

The John A. King, 49 Fed. R., 469 (472).

The Florence, 61 Fed. R., 949.

The B. B. Saunders, 25 Fed. R., 731 (Wallace, J.)

But her act in refusing to accept the proposition was in law equivalent to a refusal, and the only legal way of declaring that refusal. The testimony of Capt. Miller of the Conemaugh shows that the refusal in no way contributed to any movements of the Conemaugh, or in any way interfered with his management of her.

See testimony.

Capt. Miller of the Conemaugh testifies as follows, after his statement of the exchange of two whistles with the Burlington, starboarding his helm, and running across the river:

35.

CROSS-EXAMINATION.

Q. Well, now, captain, I understand, about the time you steadied, you made the port light and masthead light of what proved to be the New York?

A. Yes, sir.

Q. How were you heading at that time with reference to the stream?

A. At right angles, or a trifle up stream.

Q. Your starboard light then ought to have been visible to the New York?

A. Yes, sir.

Q. And you blew two whistles?

A. Yes, sir, and continued to run across the river.

Q. And soon you opened her starboard light?

A. Yes, sir, at the time I blew the second blast of two whistles.

Q. She seemed about the middle of the stream?

A. A little on the American side of it.

36.

Q. When you gave her two whistles, what did you expect from her?

A. That we would pass starboard to starboard.

Q. What did you expect from the New York?

A. Expected her to pass on her starboard hand, and I would pass on his starboard hand.

Q. Did you expect him to starboard his helm?

A. No, sir.

Q. Did you expect him to port his helm?

A. No, sir.

Q. Did you expect him to check his boat?

A. I didn't.

Q. Or stop his boat?

A. No, sir.

Q. But you expected him to keep along on that course with the speed he was then holding?

A. Yes, sir.

Q. You didn't expect anything else from him?

A. No, sir.

Q. You knew that was his right?

A. Yes, sir.

Q. You knew it was your duty to keep out of his way?

A. Yes, sir.

Q. Did it occur to you, I will ask you again, at that time when you were considering the rights of the New York and your own obligation, what was to be done with this string of three barges which was between you and the New York?

A. *I had got done with them, I had found the tail end of them.*

37.

Q. You didn't get any reply to those two whistles?

A. No, sir.

Q. How long did you wait before you repeated them?

A. Not a great while.

Q. You had got on a course that would certainly clear you, so far as the stern barges were concerned?

A. Yes, sir.

Q. So any anxiety you might have had was disposed of when you had accomplished that? Any anxiety you may have had with reference to the tow you had gotten rid of by getting your boat around so that you would steer clear of her?

A. Yes, sir.

Q. When you blew the New York that signal of two blasts, your mind was perfectly easy?

A. *Just before I blew it, no.*

Q. *Blowing it did not disturb you?*

A. *I had to get out of his road then.*

Q. *He was a mile away?*

A. *At that time he was not showing only his red light.*

Q. Did that induce you to repeat your signal any quicker than you would if he had been showing you both his lights?

A. Yes, sir.

Q. Then you hadn't waited as long as you usually wait?

A. No, I think not.

Q. And you repeated that signal of two blasts to him about that time he showed you both his lights?

A. Yes, at that time I got a glimpse of both.

Q. Did he open it, or did you open it?

38. |

A. It appeared I was opening it.

Q. You think you were opening it?

A. Yes, sir.

Q. *Did the failure of the New York to answer your first two blasts cause you to make any change in the course of your vessel?*

A. No, sir.

Q. *Nor in the speed of your vessel?*

A. No, sir.

Q. *Nor in the condition of her helm. You didn't make any change on account of his failure to answer your first two whistles.*

A. No, sir.

Q. *And you blew him another two about the time you opened the starboard light?*

A. Yes, sir.

Q. *Standing on the same course across the river?*

A. *I think by this time we had started to follow the tow back again.*

Q. *Had you steadied?*

A. *Steadied, and after they steadied, followed the tow back again.*

The Court:

Q. *You had ported when you sounded the second signal of two blasts?*

A. Yes, sir, we swung the port wheel slow.

Q. When did you give that order to port?

A. Soon after steadying, when I found we were heading up the river above the tow, then I sung out, "Steady, follow them back so as to keep that distance off."

Q. With reference to blowing the first two blasts, when was the helm ported?

A. It was about that time.

Q. Then when, in fact, you were in that condition, seeing the port and masthead light of the propeller New York, and realizing your duty to get across his bow, get out of his way, you ported your helm, instead of keeping on and getting out of his way? Is that what you mean to say now?

A. Then I was swinging slowly under a port helm.

Q. When you opened his starboard light, you knew how he was heading, didn't you?

A. Yes, sir.

Q. And you blew him two whistles again?

A. Yes, sir.

Q. And he didn't answer?

A. No, sir.

Q. Did you change your helm, your speed, or your attention in any way?

A. No, sir.

39.

Q. Then his failure to answer you didn't make any difference with the navigation of your boat?

A. No, sir.

Q. You stood on about the same length of time, I suppose, then you repeated your signal?

A. Somewhere about the same.

Q. Making the third signal?

A. Yes, sir.

Q. Hadn't you got clear of the barges by that time?

A. No, sir.

Q. Where were you when you repeated your signal for the second time, which would be the third signal?

A. *We were pretty near abreast of the tail of the tow.*

Q. Where was the New York?

A. *I could see the New York then; he appeared to be in here between the second and third barges from the end.*

Q. You hadn't crossed his lines yet?

A. *I had both lights open.*

Q. *But you hadn't crossed his bow when you blew the third signal to him?*

A. *No, I think not.*

Q. *He didn't answer that?*

A. *No, sir.*

Q. He kept coming right along?

A. *Yes, sir.*

Q. *Seemed to be pretty close to the tow, didn't he?*

A. *He appeared to be.*

Q. *And his failure to answer your whistle made no difference in the navigation of your boat?*

A. *It was right about this time, somewhere between the third signal and the alarm signal, when I sung out, "Hard-a-starboard, steady; then hard-a-starboard."*

Q. *I am just now navigating with you on the Cone-maugh, having twice had my signals of two whistles ignored; blowing a third signal to the New York, at which time you haven't yet passed the stern barge in the tow, and the New York seemed to be between the second and third barges, holding pretty close to them?*

A. *Yes, sir.*

Q. *She didn't answer that signal?*

A. *No, sir.*

Q. *You didn't change your course then?*

A. *I think it was about that time we steadied.*

Q. *About that time you starboarded?*

A. *I said steadied.*

Q. *Steadied from a port helm?*

40.

A. *Yes, sir.*

Q. *About the time he failed to respond to your third signal you stopped swinging under your port helm?*

A. *Yes, sir.*

Q. *He was then showing you both his side lights?*

A. *Yes, sir.*

Q. *And you hadn't reached the course of the stern barge?*

A. *Coming on to it, then, about that time.*

Q. *Now, captain, if you hadn't steadied from the port helm, you think you would have swung down on the port side of the New York?*

A. *Yes, sir.*

Q. *Did you steady?*

A. *Yes, sir.*

Q. *Did your vessel stop her swing?*

A. *I believe so.*

Q. *And then you blew him a fourth signal of two whistles?*

A. *No, sir, that was an alarm whistle, several short blasts.*

This is demonstrative proof that, had the Conemaugh obeyed the rule by porting and going down the port side of the New York, there would have been no collision.

5. As to the duty of the New York to maintain a sufficient lookout.

The answer in this case denies the allegation of the libel that the New York did not maintain a sufficient lookout.

That allegation, it was the Conemaugh's duty to establish by testimony, as upon her was the burden of proof,

having admittedly been guilty of violations of the rules of navigation sufficient to account for the collision.

The City of New York, 147 U. S., 72 (35).

The Carroll, 8 Wall., 303-304.

The Columbia, 10 Wall., 246.

The Victory, 18 S. C. R., 149.

By the libellant's proof, when the New York was signalled by the Burlington, she replied instantly to the Burlington's passing signal and took her proper course in accordance therewith. This is some evidence of a sufficient lookout and contradicts the allegation.

The charge made is based upon inference, and petitioner asks the Court, notwithstanding the implication that the New York did her duty, and that the burden is upon him to sustain his charge, to imply this from the fact that she did not reply to his passing signals.

When we consider, as will appear from the testimony, that the Conemaugh's navigation in "porting and following the tow down" was such as to show to the New York her red light, it isn't surprising that in the darkness of the night the New York should have taken the Conemaugh, or the vessel carrying the rear red light, and in the relative situation with the tow which she was, for one of the tow.

Under such circumstances the New York performed her duty and the presumption that she had a lookout is in her favor rather than in the self-convicted steamer Conemaugh.

6. "As to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel."

When the New York had entered into the agreement with the Burlington to pass her tow under a port helm, and had ported and taken the proper course toward the

Canadian shore, to enable her to perform that maneuver, the Conemaugh had not yet appeared; the Burlington with her tow was swinging across the river, rounding to at the coal dock, to which she was nearly opposite.

It was in the night time, and the New York and rear barges of the tow were something more than a mile apart; the New York had only the lights of the tow to guide her in keeping clear of the barges on the one side, and on the other she saw that she must approach unusually close to the Canadian shore, so that she shifted her course just sufficiently to starboard, as the condition of things then were, to enable her to pass the barges and at the same time safely keep clear of the Canadian bank. Counsel cites the Lake St. Clair Canal as evidence that there was ample room. The canal has a pier on each side, and every master knows he may go to the pier. The Canadian bank has no such guide, and at night the shore line is invisible. She could not then see that the barges would maintain their courses under the force of the current and the weight of their tow lines before being brought up and taken across to the American shore. As she approached, however, seeing by the barges' lights that they had pulled on to her course, she ported her helm and deviated to starboard, a space of from 50 to 100 feet, just sufficient to enable her to run down alongside of the barges that distance away from them. Had she not taken this precaution she would not have cleared the two rear barges. There was nothing, so far as she could tell, but the barges ahead of her; if the Conemaugh was ahead she could not be known or recognized, as she was showing to the New York her red light.

See testimony of Captains of Amaranth and Ferguson.

At this time the Conemaugh was maneuvering under the order to her wheelsman, "Port and follow the tow

around," and was exhibiting to the stern barges both her side lights.

Dominick Jeans, Captain Amaranth, p. 87, testified:

I watched him closely and I saw his green and red light and masthead light along, until he came to sheer on the Canada side, then I lost his red light and saw his green light.

Loomis, P. Smith, Captain Ferguson, p. 97, testifies:

After he went across the river and ported his wheel, I followed him along down the river, he ported so he showed me just a glimmer of his red light before he starboarded again.

Q. A glimmer of his red light, and what other light did you see?

A. His green light and masthead light.

P. 103:

Q. What lights on her (Conemaugh) did you see at the time she blew the whistles to the Burlington?

A. I saw his red and masthead light, his port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. You did not see both of the Conemaugh's lights at any time?

A. Yes, sir, right after the signal, I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile, I should judge, up the river.

P. 106:

Q. The Conemaugh then was virtually following you, keeping astern of you and following you around?

A. She appeared to be.

Q. And in that way it was you got the glimmer of her red light, in addition to her green light?

A. Yes, sir.

The New York had not yet learned of the presence of the Conemaugh, she had heard her signal; she had seen an exhibition of both her side lights, undoubtedly assuming them to be only the tow barges; being guided by the provisions of the rules of the road, she had no reason to expect the presence of the Conemaugh or any other than one of the tow in the position she was.

Counsel's position now is that the presence of the tow did not present such an obstruction as is contemplated by the rule laid down in

John L. Hasbrook, 93 U. S., 405.

and the other cases referred to by the Court of Appeals, in its opinion. Counsel's contention is that the New York, seeing the barges pull on to her course, should have stopped and waited until they got out of her way.

The New York had only for her guide the red lights of the barges, her only safe act was to keep those red lights over her port bow. The Conemaugh claims to have had a clear view of the New York, also of the barges in tow, therefore she saw the difficulty ahead of the New York and knew full well the New York's change of course it was her duty to make (under Rule 24) in order to clear those barges. A glance at the chart will show that the Conemaugh was in no way interfered with by that change. The master of the Conemaugh testified that he was in no way affected by it.

Capt. Miller, of the Conemaugh, testifies:

P. 187:

Q. You had blown her three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. *And she had not replied to you at all?*

A. No.

Q. *Why didn't you go down on the port side of her when you saw the boats in that position?*

A. *Having signified my intention, I concluded it was my best policy to hang on to the course I was on.*

Q. You were bound to keep your course, were you?

A. I would have crossed his course if he had kept on as he was at the time of blowing those whistles.

P. 188:

Q. What change of course did the New York make that was not necessary for her to make to come by those barges?

A. I don't know sir. I was on my own boat at that time.

Q. You don't know that she made any change of course that was not necessary for her to make for that purpose, do you?

A. I do not.

Q. *And the only reason you can give for not porting and going down on her port side, at the time when the boats were in the position that you have placed them, is that you had blown two whistles?*

A. Yes, sir.

Q. *And you thought you must keep the course you indicated by those two whistles?*

A. Yes, sir.

Q. You knew you had the right to take either side of her, didn't you?

A. I supposed I had a right to hang on to that side of her after I had signalled my intention.

Q. *You were navigating under the theory you had the right to that side because you had whistled for that side?*

A. Yes.

Q. I want to go back a little further with the question and ask you to please state to the Court what change of course from the time you first saw the New York, until the boats were in collision, the New York made, that was not necessary to take her safely by those barges.

A. That I could not say.

Q. You don't say that she made any, do you?

A. That was not necessary to take her clear of the barges.

Q. When the boats were in that position, what did you expect the New York to do?

A. I expected him to come out here.

Q. Did you expect him to starboard and go across the stern of that barge?

A. Under the stern of the barge; yes, sir.

Q. And leave you room to go down on his starboard side?

A. Yes, sir.

Q. *You understood it was his duty to do that, did you?*

A. Yes, sir.

Q. *Because you had blown him two whistles?*

A. Yes, sir.

Q. Did you state, or do you recollect, without regard to what you have stated heretofore, that the New York seemed to have starboarded just before the collision?

A. I don't think I did, sir.

Q. Did she?

A. I couldn't say whether she did or not.

P. 189:

Q. Then you can't recollect of any change in her heading until she struck you, from the time you passed the stern of the stern barge in tow?

A. No, sir; I can not.

Q. Did you expect the New York to stop?

A. No, sir.

Q. Did you expect her to check?

A. No, sir.

Q. You knew she had no duty to stop or check?

A. Unless the captain saw fit to do so.

Q. But your whistle to him indicated no such obligation in your judgment?

A. It did not, sir.

Q. Did you expect the New York to starboard her helm before she reached the stern of the last barge in tow?

A. I expected her, certainly, sir, to pass on our starboard hand at the same time.

P. 190:

Q. You expected, when she reached the proper point, whatever it was, that she would pass on your starboard side?

A. Yes, sir.

Q. You expected that, because you had blown her two whistles?

A. Yes, sir, and when I was blowing those whistles almost across her course.

Q. You had her on your starboard side?

A. Yes, sir.

And the evidence is that the New York resumed her original relative position as soon as she could do so. She was swinging under starboard helm when she could get round the rear barge.

The rule of the road at this time compelled the New York to keep clear of the barges.

Rule 18, Rev. Stat., Sec. 4233.

Rule 19 made it her duty, subject to the qualifications of Rule 24, to maintain her course and speed.

I submit counsel's position is unreasonable and untenable.

7. Petitioners' last complaint is that the New York did not check or stop her speed.

Counsel cites the "Delaware, 161, U. S., 459," "That it will not be a fault for the preferred vessel to maintain her course and speed in the absence of some distinct indication that the other is about to fail in her duty," and he bases his contention upon the fact that, the Conemaugh, having continued to sound her two-whistle signal, amounted to a threat, which the New York should have accepted that the Conemaugh was going to attempt to cross her bow, and thus fail in her duty to port in accordance with the Inspectors' Rules.

Counsel argues that it is conceded:

First. "That the steamers were approaching on crossing courses, so as to involve risk of collision."

About this there is no question.

Second. "That each was showing to the other a single colored light. * * * * The New York at no time saw the Conemaugh's red light."

In this counsel is in error. It was unquestionably the red light of the Conemaugh that led the New York to think the last light she saw in range with the line of the tow, was upon the last barge of the tow. The proof that

she saw this red light is furnished by the testimony of the captains of the two rear barges.

DOMINICK JEANS, captain of the Amaranth, page 87, testifies:

I watched him closely, and I saw his green and red light and masthead light along, until he came to sheer on the Canada side; then I lost his red light and saw his green light.

LOOMIS P. SMITH, captain of the Ferguson, page 97, testifies:

After he went across the river and ported his wheel, I followed him along down the river. He ported so he showed me just a glimmer of his red light before he starboarded again.

Q. A glimmer of his red light; and what other light did you see?

A. His green light and masthead light.

Page 103:

Q. What lights on her (Conemaugh) did you see at the time she blew the whistles to the Burlington?

A. I saw his red and masthead light, his port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. You did not see both of the Conemaugh's lights at any time?

A. Yes, sir, right after the signal, I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile, I should judge, up the river.

Page 106:

Q. The Conemaugh then was virtually following you, keeping astern of you and following you around?

A. She appeared to be.

Q. And in that way it was you got the glimmer of her red light, in addition to her green light?

A. Yes, sir.

(See Chart No. 4.)

There is no question that in the position the Conemaugh kept while "porting and following the tow down," she exhibited both her side lights to the New York, and the New York took them as the lights of the rear barge in the tow, and was thus deceived by the failure of the Conemaugh to steer in accordance with the indication of her signals.

The Conemaugh followed in the track of the barges, until she saw the New York coming close by the stern of the rear barge, when she blew an alarm, put her helm hard-a-starboard, and swung across the New York's bow. There was almost the width of the river for her, had she ported her helm in accordance with the Inspectors' Rule; indeed, when she blew the last signal of two whistles, which was but a moment before the alarm, she was swinging under a ported helm, and, as her captain admits, had she not sheered, she would have swung clear, and there would have been no collision.

CAPTAIN MILLER testifies, page 40, as follows

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then, about that time.

Q. *Now, captain, if you hadn't steadied from the port helm, you think you would have swung down on the port side of the New York?*

A. Yes, sir.

Page 187:

Q. You had blown her three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. And she had not replied to you at all?

A. No.

Q. *Why didn't you go down on the port side of her when you saw the boats in that position?*

A. *Having signified my intention, I concluded it was my best policy to hang on to the course I was on.*

Page 188:

Q. What change of course did the New York make that was not necessary for her to make to come by those barges?

A. I don't know, sir. I was on my own boat at that time.

Q. You don't know that she made any change of course that was not necessary for her to make for that purpose, do you?

A. I do not.

Q. *And the only reason you can give for not porting and going down on her port side, at the time when the boats were in the position that you have placed them, is that you had blown two whistles?*

A. Yes, sir.

Q. And you thought you must keep the course you indicated by those two whistles?

A. Yes, sir. I supposed I had a right to hang on to that side of her after I had signalled my intention.

Q. You were navigating under the theory that you had the right to that side, because you had whistled for that side?

A. Yes.

There can be no question of this, and it is shown to a demonstration by the chart. (No. 4). Had the *Conemaugh*, after blowing her third blast of two whistles (which the Answer says was not replied to by the *New York*, because supposed to be blown for some other vessel), ported a little, or even continued on the course she was then steering, there would have been no collision. There was nothing to prevent her doing this; the law demanded it of her. In this situation there was no cause for the *New York* to check her speed. In the language of this Court, "So long as it is possible for the other (preferred steamer) to avoid her (burdened steamer) by porting, at least in the absence of some distinct indication that she is about to fail in her duty," the preferred steamer will not be held in fault for maintaining her course and speed. (The *Delaware*.)

We call the attention of the court to the language of the Court of Appeals, 2nd Circuit, in the case of *The Geo. S. Shultz*, 84 Fed., 508 (511):

"It might be surmised * * * that there will be found no inconsiderable number of masters who will never shoulder any burden of navigation which, by the rules, lay upon them, if they can force the privileged vessel to assume it, or at least to share it with them. These are the men who hold on a course which they know to be expressly forbidden by the rule, until the very last moment, hoping thus to coerce the other and the privileged vessel to yield the right of way. The dread of injury to his own vessel or to himself, his crew and passengers, will no doubt often induce the master of the privileged vessel to yield—a

timidity no doubt augmented by the many decisions which have held the privileged vessels in fault for not doing something themselves to avert the catastrophe. If, however, the master of the privileged vessel declines to be bluffed out of his right of way, the lawless navigator will usually, at the eleventh hour, conform his navigation to rule. If there be still time to save the situation, no harm is done. If the offending master has miscalculated and held on too long, and collision results, he is usually vociferous in support of the proposition (which is no doubt correct) that if the privileged vessel had only stopped or changed her course and left him free to go where he chose, no catastrophe would have ensued. This class, if it exist—and we do not doubt it does—is a standing peril to navigation. Excuse should be difficult for any master who, with full knowledge that he is the one who, under the rules, should change his course or speed or both, begins his navigation in the presence of approaching risk of collision by insisting that the other vessel shall make such changes.”

This language describes the evident spirit of the Conemaugh's master in his neglect to obey the rule of navigation, which required him to port and go down on the New York's port side.

In lieu of so doing, the Conemaugh starboarded her helm and swung across the course of the New York. Both vessels were then in extremis, and the result was the collision.

The true cause of this collision was the neglect of the master of the Conemaugh to obey the laws of navigation; to keep clear of the New York; to follow the port helm or starboard hand rule.

The New York in no way contributed to the misdeeds of the master of the Conemaugh, and not until after the

Conemaugh had starboarded and was swinging across her course, did the New York have any "distinct indication" that the Conemaugh was about to fail in her duty, and then the boats were practically in collision.

The decision of the case by the Court of Appeals was correct.

H. C. WISNER,

C. E. KREMER,

Proctors for Respondent and Appellee.

W. O. JOHNSON,

Of Counsel.

THE NEW YORK.¹

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 56. Argued October 19, 1899. — Decided November 20, 1899.

In 1891, the navigation of steamers upon the Great Lakes and their connecting waters was governed by the Congressional Rules and Regulations of April 29, 1864, Rev. Stat. § 4233, and, so far as the manœuvres of the vessels took place in American waters, by the Supervising Inspectors' rules in force at that time.

The Revised International Regulations of 1885 apply only to vessels navigating the high seas and coast waters of the United States, and not to those navigating the Great Lakes.

A court of admiralty may properly take judicial notice of an act of the parliament of Canada regulating the navigation of Canadian waters, passed in 1886, as a law of the sea and of general application.

Where a Canadian statute was introduced and treated as evidence by consent of counsel upon a motion for a rehearing in the District Court, though it did not appear of record, and, in obedience to a writ of

¹ The docket title of this case is *The Erie & Western Transportation Company v. The Union Steamboat Company*, claimant of the Propeller "New York."

Statement of the Case.

certiorari from the Court of Appeals, was certified up to the Court of Appeals by the clerk of the District Court as a true copy of the original act as published, it was held that the Court of Appeals should have treated the act as properly before it, notwithstanding the clerk did not certify it to be a part of the record.

The steamer Conemaugh, while descending the Detroit River at night, discovered in her path a long tow, which was rounding to on the American side and was temporarily taking up three fourths of the navigable channel, and starboarded in order to pass between the rear barges and the Canadian channel bank. While proceeding under her starboard wheel, she made the lights of the propeller New York ascending the river. She blew her three signals of two whistles each, to neither of which the New York responded. On discovering the rear barges of the tow, she ported to follow them down the river, and upon discovering the New York in dangerous proximity, put her helm hard-a-starboard and her engines at full speed. The New York was at the same time coming up under a port wheel, and struck the Conemaugh on the starboard side and sank her. *Held* that the Conemaugh was in fault (1) for not stopping when the New York failed to answer her signals; (2) for porting and then starboarding in order to cross the bow of the New York.

The New York, while ascending the river, made the lights of the tow, exchanged signals of one whistle with the propeller in charge of it, and ported her wheel to pass between the rear barges and the Canadian channel bank. She heard no signals and did not make out the colored lights of the Conemaugh. As she passed the rear barges she starboarded to resume her course, and struck the Conemaugh as above stated. *Held*: That she was in fault (1) for an inefficient lookout; (2) for failing to answer the repeated signals of the Conemaugh; and (3) for failure to stop after she made the white light of the Conemaugh, until her course and movements had been satisfactorily ascertained.

The fact that the officers of a steamer fail to see the signal lights of an approaching steamer, which are seen by other witnesses in the neighborhood, or to hear the whistles of such steamer which were plainly audible to others, is, unexplained, conclusive evidence of a defective lookout.

It is the duty of a steamer receiving signal whistles from an approaching steamer to answer them promptly; but it is also the duty of such approaching steamer, on the failure of the other to answer, to stop until her silence is explained and her course ascertained with certainty.

Where the owners of a cargo of a steamer, which has been sunk by collision occasioned by the mutual fault of two colliding steamers, intervene for their interest in a suit instituted by the owners of the carrying vessel against the other, they are entitled to recover full damages against such other vessel, notwithstanding the damages to such vessels are divided as between themselves.

THIS was a libel in admiralty filed by the Erie & Western Transportation Company, owner of the propeller Conemaugh,

Statement of the Case.

and a cross-libel by the Union Steamboat Company, owner of the propeller New York, against the propeller Conemaugh, to recover damages for a collision between these vessels which occurred between seven and eight o'clock in the evening of October 21, 1891, on the Canadian side of the Detroit River, a short distance below the village of Sandwich in the Province of Ontario, and between what is known as Petite Côte, on the Canadian side, and Smith's Coal Shutes, on the American side of the river. The river at this point is nearly straight, and flows in a direction about south-southwest. The underwriters of the cargo of the Conemaugh were permitted to intervene to protect their interests.

The libel of the Conemaugh averred that she was bound from Milwaukee to Erie, Pennsylvania, with a cargo of about 1800 tons of package freight; that she was proceeding down the river on the American side of mid-channel, "having hauled some to starboard to avoid some piles driven in the channel," and known as the Kasota piles, and when half or three quarters of a mile above Smith's Coal Dock, she received a signal of two blasts from the steamer Burlington, which, with four barges in tow, had gone down the Canadian side of the river, and was then rounding to at the coal dock on the American side, exhibiting her masthead and green lights to the Conemaugh. Her engine was at once checked, and remained checked until the time of the collision, her helm starboarded, the whistle answered by two blasts, and the propeller hauled out sharply, keeping some distance above the tow, and so directing her course as to pass astern and to the Canadian side of the tow, which was then stretched out in the river toward that side; that the Conemaugh then made the lights of the New York down the river below the tow, and coming up toward the Conemaugh upon such a course that the Conemaugh would cross the course of the New York before the latter could reach the point of intersection; that the Conemaugh at once blew her a signal of two blasts, notifying the New York that she was so directing her course as to keep well in on the Canadian shore, and to leave the New York to starboard as she should come abreast of the tow. Receiving

Statement of the Case.

no reply thereto, the Conemaugh repeated the signal of two blasts. The New York did not reply to this second signal, whereupon the Conemaugh blew a third signal of two blasts, when the New York, which had all the time been coming rapidly up the river, without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over to the Canadian side; seeing which, the Conemaugh blew alarm whistles and hard-starboarded her helm. But the New York, first swinging rapidly and violently to starboard, and apparently turning some to port before she struck, came on at full speed, struck the Conemaugh on the starboard side abreast the texas, cut deeply into her, and crushed her side. The Conemaugh almost immediately struck the Canadian bank of the river and filled and sank.

The answer and cross-libel of the New York averred that she was bound on a voyage from Buffalo to Milwaukee, laden with a cargo of general merchandise; that at the time of the collision she was bound up the Detroit River, and when near the point in said river below where the River Rouge empties into it, a steamer—the Burlington—with a tow of four barges, began to round to from the Canadian side to Smith's Coal Dock on the American side, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow. To this the New York blew her a passing signal of one blast, "at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, this signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern.

Statement of the Case.

While passing under the stern of this barge, and not more than ten or twenty feet from her, several short blasts of a propeller, which proved to be the Conemaugh, were heard close at hand, and not more than one hundred feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and to swing clear under a hard-a-starboard helm. This was done. Notwithstanding this the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside." The New York immediately backed, and offered her assistance to the Conemaugh, but as she was then on the bank she refused the assistance. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the Burlington, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, where no steamer could pass with safety, starboard to starboard.

A large amount of testimony was introduced on behalf of the libellant, but none whatever by the claimant. A hearing upon pleading and proofs before the District Court resulted in a decree holding both vessels in fault and dividing the damages, although the District Judge expressed some doubt with regard to the fault of the Conemaugh. 53 Fed. Rep. 553. Libellant soon thereafter moved for a rehearing upon the ground that the rules of the Supervising Inspectors had no application; that the international rules adopted in 1885 governed the case, and asked leave to submit further testimony, and for other reasons. This was granted, and a new decree entered vacating the former decree, and adjudging the New York to have been solely in fault upon the ground that, under

Statement of the Case.

the case of the *City of New York*, 147 U. S. 72, 85, then recently decided, the fault of the Conemaugh had not been proven with sufficient clearness to justify a division of damages. Thereupon the claimant moved to vacate the decree and for leave to introduce evidence in its own behalf, which was denied. This motion was repeated upon affidavits, and the deposition of the master, second mate and engineer of the New York taken *de bene esse* under the statute. The motion was however denied; the depositions stricken from the files, and a final decree entered against the New York for the damages and loss to the Conemaugh and her cargo.

Thereupon the claimant appealed the cause to the Circuit Court of Appeals, and upon the record being filed in that court, a motion was made by the libellant for an order that the testimony of a witness be taken to prove the Canadian statute in force for regulating the navigation of the waters of the Province of Ontario at the time of the collision, and that a copy of such statute be introduced in the cause. This motion was supported by an affidavit that the Canadian statute was introduced in the District Court, and used and referred to in the arguments upon the rehearing before the District Judge; that such statute was then treated and used as part of the record; but there was no stenographer present at the time and no minute of such introduction and use of the Canadian statute was preserved in the record. The motion for an order permitting testimony to prove the Canadian statute appears to have been withdrawn, a suggestion of diminution of record substituted and a writ of certiorari asked for and granted to supply such evidence as did not appear in the record. The District Court made return to this writ by an order that the clerk transmit to the Court of Appeals a certified copy of the Canadian statutes governing the navigation of vessels in the waters of Canada during the year 1891. The navigation act of Canada of 1886 was thereupon sent up with a certificate of the clerk of the District Court that "the papers hereto attached, marked Exhibit A, are a true copy of the Revised Statutes of Canada, 1886, volume 1, chapter 79, entitled 'An act respecting the navigation of Canadian waters, A.D. 1886;'

Opinion of the Court.

that I have carefully compared the same with the original act as published, and find the same to be a true copy of such original and of the whole thereof."

That court, however, refused to consider this statute upon the ground that the return of the District Court to the writ contained no certificate that the statute was made a part of the record by being offered and received in evidence, but only a statement by the clerk that "that which is returned is a correct copy of the Canadian statute as published."

The hearing of the appeal resulted in a reversal of the decree of the District Court, and a remand to that court with directions to dismiss the libel of the Conemaugh upon the ground that she only was in fault. 54 U. S. App. 248. A rehearing was subsequently asked for and denied. 56 U. S. App. 146.

Whereupon libellant applied for and was granted a writ of certiorari from this court.

Mr. F. H. Canfield and *Mr. Harvey D. Goulder* for petitioners. *Mr. John C. Shaw* was on *Mr. Goulder's* brief.

Mr. H. C. Wisner and *Mr. C. E. Kremer* for respondents. *Mr. W. O. Johnson* was on their brief.

MR. JUSTICE BROWN, after making the above statement of facts, delivered the opinion of the court.

This collision took place in October, 1891. The navigation of the two steamers was therefore governed by the Congressional Rules and Regulations Act of April 29, 1864, c. 69, 13 Stat. 58, reproduced in Revised Statutes, section 4233, and, so far at least as the manœuvres of the respective vessels took place in American waters, by the Supervising Inspectors' rules in force in 1891.

The Revised International Regulations of 1885, act of March 3, 1885, c. 354, 23 Stat. 438, apply only to navigation "upon the high seas and in all coast waters of the United States;" and in section two, repealing prior inconsistent laws,

Opinion of the Court.

there is an exception of vessels navigating "the harbors, *lakes* and inland waters of the United States." It is true that in *Moore v. The American Transportation Co.*, 24 How. 1, the limited liability act of 1851, which contained an exception of vessels used "in rivers or inland navigation," was held, notwithstanding this exception, to apply to vessels navigating the Great Lakes; but the cases are readily distinguishable. In that the exception was "any canal boat, barge or lighter, or (to) any vessels of any description whatsoever, used in rivers or inland navigation." It was held that the character of the craft enumerated might "well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the lawmakers, which are designated by the place where employed." But the case was really decided upon the ground of the magnitude of the Lakes, their commerce, their vessels and the well-known perils incident to lake navigation. It was thought that such commerce deserved to be placed on the footing of commerce on the ocean, and that "Congress could not have classed it with the business upon rivers, or inland navigation," in the sense in which we understand these terms. In the present case the exception is specifically of "vessels navigating the harbors, *lakes* and inland waters of the United States." If the word "*lakes*" was not intended to include the Great Lakes it is difficult to see the object of Congress in making use of that word, since nearly all the other navigable lakes, except Lake Champlain, are located within the limits of a single State, and no act was necessary to exempt them, as the power of Congress does not extend to the purely internal or infraterritorial commerce of the country. *The Montello*, 11 Wall. 411; *Veazie v. Moor*, 14 How. 568.

The question, however, is one of little practical importance in this case, inasmuch as rule 19 of Rev. Stat. § 4233 is word for word the same as article sixteen of the Revised International Rules and Regulations of 1885. Both are as follows: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own star-board side shall keep out of the way of the other."

Opinion of the Court.

The power of the Supervising Inspectors to adopt rules for the government of steam vessels in passing each other, Rev. Stat. § 4412, is limited by sec. 4400 to steam vessels "navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation." These rules are pertinent to this case only so far as they make it the duty of vessels to indicate by signals of one or two whistles the course they are about to take, and of the other vessel to answer them, and also, in case of vessels crossing each other, within the meaning of article sixteen, in requiring the obligated vessel to avoid the other by porting and going under her stern. These rules are as follows:

Rule II. "When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head' or nearly so, and the signals by whistle shall be given and answered promptly, as in that case specified."

Rule III. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course of the other, whether from signals being given or answered erroneously or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and after the vessels have approached within half a mile of each other both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

Rule VI. "The signals by the blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting at a distance of within half a mile, and whether passing to the starboard or port."

1. We are of opinion that the Canadian statute of 1886 may properly be considered by us.

The question how far this court may take judicial notice of the laws of a foreign country has been the subject of some discussion, and was first considered by this court in the case of

Opinion of the Court.

Talbot v. Seeman, 1 Cranch, 1, 38. That was a case of salvage upon recapture from the French. It became necessary to inquire whether the laws of France were such as to have rendered the condemnation so probable as to create a case of such real danger that her recapture could be considered a meritorious service. To prove this, counsel offered several decrees of the French government, to the reading of which objection was made upon the ground that they were the laws of a foreign nation, and therefore to be proved as facts. In holding that the decree, having been promulgated in the United States as a law of France, was entitled to be read, Mr. Chief Justice Marshall observed "that the laws of a foreign nation, designed only for the direction of its own affairs are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact. The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted, (and such seems to have been the general practice,) in which the marine ordinances of a foreign nation are read as law without being proved as facts. It has been said that this is done by consent; that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet this decree, having been promulgated in the United States as the law of France by the joint act of that Department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume the character of notoriety which renders it admissible in our courts."

The same question as applied to the original Rules and

Opinion of the Court.

Regulations was presented to us in the case of *The Scotia*, 14 Wall. 170, in which we held that, in view of the fact that these rules and regulations were originally adopted by the British Orders in Council of January 9, 1863, and by Congress in 1864, and had been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we would take judicial notice of them and treat them as laws of the sea and of general obligation. The duty to take judicial notice of these rules was also recognized by this court in *The Belgenland*, 114 U. S. 355, 370, in *The Richelieu &c. Navigation Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 422, and in numerous cases in the lower courts. There is nothing in the case of *The Liverpool &c. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, in conflict with this. That did not involve a question of general maritime law, but of a statutory exemption from the consequences of negligence in navigation given by a British act of Parliament. We know of no reason why the rule adopted in *The Scotia* should not be applied to the Revised International Rules and Regulations. They have also been adopted by most, if not all, the nations which gave their assent to the original rules and regulations of 1863, and the reasons which induced this court to take judicial notice of these rules are equally persuasive here. The reference to the Canadian statute of 1886, used in the District Court and printed as a part of the record here, shows it to be, except as to the waters covered by it and as to certain immaterial local regulations, a literal copy of the Congressional act of 1885.

But we think that for another reason the act is properly before us. After the case had been appealed to the Circuit Court of Appeals, the libellant moved that court for an order requiring the testimony of a witness to be taken to prove the Canadian statute, and filed in support of this motion affidavits that in the printed record there was no copy of this statute, but that it was introduced in the District Court and used and referred to in the arguments upon the rehearing before the District Judge; that at that time the libellant offered to prove the statute by oral testimony, but that it was then agreed in

Opinion of the Court.

open court between the proctors that the testimony of such witness might be dispensed with, and that the statute then in court might be used without technical proof thereof. No order was made upon this motion, but there was a further suggestion to the court of a diminution of the record in that the Canadian statute, which was introduced and used as evidence in the District Court, did not appear in the record, and a writ of certiorari was granted "because the transcript of the record in this case does not contain a copy of the Canada statutes governing the navigation of vessels in the waters of Canada during the year 1891, which was introduced in evidence, as alleged." In obedience to this writ, the clerk of the District Court was ordered to transmit to the Circuit Court of Appeals a certified copy of the Canadian statute. This was done, but the clerk, instead of certifying that it was a part of the record, certified only that he had "carefully compared the same with the original act *as published*," (by which we understand as published in the statutes of Canada,) "and find the same to be a true copy of such original and of the whole thereof." It thus appears that the Canadian statute had been used in the District Court by consent of counsel, had been treated as part of the record, and that the copy sent up was a true copy of the statute as published. It is true that the clerk did not formally certify it to be a part of the record, but the fact that it had been so treated was established by the affidavit; and the writ of certiorari upon its face recited the fact that a copy of the statute had been introduced in evidence, as alleged, and required the court below to "send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said District Court." In view of these proceedings, we think the Circuit Court of Appeals should have accepted the certified copy of the statute as properly in evidence before it.

The only novel feature of this statute, pertinent to this case, is as follows:

"Art. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the follow-

Opinion of the Court.

ing signals on her steam whistle, that is to say: One short blast to mean 'I am directing my course to starboard;' two short blasts to mean 'I am directing my course to port;' three short blasts to mean 'I am going at full speed astern.' The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made."

In this view, the question whether two American vessels running from one American port to another are bound, whenever they cross the boundary line between the United States and Canada, which at this point is the *filum aquæ* of Detroit River, to conform to the navigation laws of Canada, does not arise in this case. Were all the commerce of the lakes carried on in American vessels the question would be less difficult of solution. But as much of this commerce is Canadian, and it is impossible to tell whether an approaching vessel be American or Canadian, an attempt to apply the laws of the United States in all cases might result in confusion and in great injustice to Canadian vessels, in case the rules and regulations of the two countries differed in any material respect. We are saved, however, consideration of these questions by the fact that the signals and the steering rules of the United States and Canada are practically identical. This fact being once established, the duty of vessels of both nations in meeting each other, either upon American or Canadian waters, is easily understood.

2. In judging of the responsibility for this collision, it should be borne in mind that the Burlington and her tow were temporarily occupying from two thirds to three quarters of the navigable channel of the river. The distance between the rear barge and the Canadian bank of the navigable channel is variously estimated, but according to the Court of Appeals was about five hundred feet. It may have been as much as eight hundred feet, but probably was not more than that. The night was clear and starlit, the weather fine, and the collision could scarcely have occurred except by the fault of one or both vessels.

The Conemaugh, a steamer of 1609 tons burden, was com-

Opinion of the Court.

ing down the American side of the river at her usual speed of about ten miles an hour, and, when her attention was first called to the obstruction of the Burlington's tow, was about passing what are known as the Kasota piles, which were in fact the remains of a coffer dam once used in raising the steamer Kasota. They were near mid-channel, though somewhat upon the American side, and about three quarters of a mile above Smith's Coal Dock. As she was passing these piles, leaving them on her port hand, she received and answered a signal of two blasts from the Burlington, which had come down the river on the Canadian side, and was at that time rounding to at the coal dock on the American side, her tow of four barges making a crescent or semicircle, the outer arm of which was, as above stated, from five to eight hundred feet from the Canadian bank. The length of the tow was about 2600 feet, the width of the channel about 3000 feet. The Burlington at this time was exhibiting to the Conemaugh her white masthead and her starboard green light. The first barge in tow was also exhibiting her green light, but the others had not rounded to sufficiently to exhibit their colored lights. After exchanging this signal with the Burlington, the wheel of the Conemaugh was put hard-a-starboard, her speed checked, and her course taken across the stream at almost a right angle with her former course. Upon this course she was exhibiting her green light to vessels ascending the river. After she had "picked up" or discovered the rear barge her wheel was steadied, and then ported to follow the tow, which by the force of the current was gradually swinging down stream, and would ultimately round to on the American side, astern of the Burlington. As the Conemaugh steadied her wheel to starboard her watch made out below the tow and about a mile distant the white and red lights of the New York, apparently somewhat on the American side of mid-channel, and promptly signalled her with two blasts of her whistle, indicating that she would pass her to the left. No answer was received from the New York. Under such circumstances it would have been more prudent for the Conemaugh to stop and wait a few minutes, until the

Opinion of the Court.

tow had drifted down and left the channel clear below her; but inasmuch as there was a clear space of five hundred feet of navigable water between the last barge and the Canadian bank of the channel, we should hesitate to condemn her for this fault, were there no others contributing more immediately to the collision.

Receiving no answer to her first blast, the Conemaugh, when the two steamers were about three quarters of a mile apart, repeated her signal of two blasts — the New York then showing her masthead and both colored lights. Again no reply was made by the New York. The Conemaugh, which had then ported and was heading toward the Canadian shore, and about four points from the direct course down the river, gave a third signal of two blasts, the New York continuing to show all three of her lights, and being apparently close to and between the second and third barges of the tow. The New York made no answer to this third signal. The duty of the Conemaugh at this juncture was plain. She should have stopped her engines after the second signal, and, if necessary to bring her to a complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. *The Louisiana*, (*Louisiana v. Fisher*,) 21 How. 1; *The Ogdensburg*, (*Chamberlain v. Ward*,) 21 How. 548; *The R. H. Stokes*, (*Nelson v. Leland*,) 22 How. 48; *The Martello*, 153 U. S. 64, 71; *The Teutonia*, 23 Wall. 77; *The James Watt*, 2 W. Rob. 270; *The Birkenhead*, 3 W. Rob. 75; *The Hermann*, 4 Blatchford, 441; *The Huntsville*, 8 Blatchford, 228; *The Hammonia*, 4 Ben. 515; *The Mary Sandford*, 3 Ben. 100; *The Arabian*, 2 Stuart Vice Adm'y, 72. There was peculiar necessity for such action in this case. These vessels were about to meet upon crossing courses, and to pass each other in the narrowest part of the channel. The Conemaugh had three times signalled her wish to take the Canadian side, and pass starboard to starboard. The New York had three times neglected to give her assent to this arrangement. The Cone-

Opinion of the Court.

maugh had construed her failure to reply as an acquiescence in her own signals. The New York might have construed such failure as a refusal to acquiesce. In such a case it was clearly incumbent upon the Conemaugh to stop until the mystery of her silence was explained, and in failing so to do she was guilty of fault. Instead of that, while running under check and under a port helm, she steadied and almost immediately lost the green light of the New York, whereupon she sounded an alarm whistle, put her helm hard-a-starboard, and endeavored to shoot across the bows of the New York. The two steamers were then upon converging courses and about a quarter of a mile apart. Even then, if the Conemaugh had put her helm hard-a-port and reversed her engines she would probably have avoided a collision, although her final error, being apparently *in extremis*, perhaps ought not to be attributed to her as a fault. But she kept on her course at full speed, with her helm hard-a-starboard, while the New York came up the river, under a port wheel and at full speed, displaying her masthead and red light to the Conemaugh. Just before the collision the wheel of the New York was starboarded, but too late to avert the blow. She struck the Conemaugh on her starboard side near the gangway, and sank her within ten minutes. The place of the collision seems to have been very near the Canadian bank, and about one thousand feet from and a little upon the port quarter of the Ferguson, the stern barge of the Burlington's tow.

The fault of the Conemaugh appears the more flagrant from the fact that the two steamers were crossing vessels within the meaning of rule 19, (Rev. Stat. § 4233,) and that the Conemaugh, having the New York upon her starboard side, was bound to keep out of her way. The supervising inspectors' rules require that this manoeuvre shall be performed by porting the wheel and passing under the stern of the preferred vessel. But, irrespective of this rule, prudent seamanship ordinarily requires that the obligated vessel shall take a course which, if the preferred vessel perform her own duty, will certainly avoid a collision, viz., port and go astern. If, upon the other hand, she elects to starboard and cross the

Opinion of the Court.

bows of the other vessel, she incurs the manifest danger of not passing the point of intersection before the preferred vessel strikes her, and is justly considered as assuming the responsibility for the success of her manœuvre. *The E. A. Packer*, 140 U. S. 360, 366; *The Nor*, 2 Asp. M. L. Cases, 264. Of course, there may be such conduct on the part of the favored vessel as would show that she was alone guilty of fault, but the greater safety of porting is so manifest that the circumstances must be quite exceptional to justify a different course. The failure of the *Conemaugh*'s manœuvre in this case only emphasizes her original fault in failing to come to a standstill when her two first signals to the New York were disregarded.

The conduct of the *Conemaugh*, as we shall hereafter show in the navigation of the New York, was not even consistent with her own theory, which was that she would cross the course of the New York and pass down between her and the Canadian bank. Instead of doing so, however, as soon as she had "picked up" the stern barges and ascertained their exact location, she ported her helm sufficiently to display to these barges a glimmer of her red light, and as the New York was about the same time starboarding to clear these barges, the result was that neither gave the other sufficient room to pass. These circumstances were most favorable to the collision which almost immediately ensued.

3. Inasmuch as no witnesses were sworn from the New York we are compelled to judge of the propriety of her manœuvres from the admissions in her answer and from the other testimony in the case. From these it appears that the propeller, a vessel of 1700 tons, was bound up the river, and, when nearing the point below where the river Rouge empties into the Detroit just above Smith's Coal Dock, she descried the Burlington and her tow beginning to round to from the Canadian side of the river to the coal dock on the American side, exhibiting to the New York her masthead and red lights as well as the red side light of the barges in tow. The answer avers that thereupon "the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her

Opinion of the Court.

helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and the bank."

If there were no other evidence in the case than these allegations, and the uncontradicted testimony of the Conemaugh that she blew three signals to the New York, none of which were answered, it is sufficient to show the latter to have been guilty of a grievous fault. The night was clear, and there appears to have been no difficulty in seeing the white and colored lights of the Burlington and her tow, and should have been none in seeing the lights of the Conemaugh. No reason is given why the signals of the Conemaugh were not heard, and as the New York was not more than a mile distant from her when her first signal was blown, and considerably less than that when the second signal was blown, her inability to hear them is inexplicable, except upon the theory that no sufficient lookout was maintained, or that such lookout did not attend properly to his duties. Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout. *The Sea Gull*, 23 Wall. 165; *The James Adger*, 3 Blatchford, 515; *The Fanita*, 14 Blatchford, 545; *The Sunnyside*, 91 U. S. 208; Spencer on Collisions, § 175.

The force of this presumption of a defective lookout is greatly strengthened by the fact that the claimant did not see fit to put upon the stand the officers and crew of the New York, who certainly would have been able to explain, if any explanation were possible, why the lights of the Conemaugh were not seen and distinguished or her signals heard. It was said by this court in the case of *Clifton v. United States*, 4 How. 242, 246, that "to withhold testimony which it was in

Opinion of the Court.

the power of the party to produce in order to rebut a charge against him, where it is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge." If the New York heard the signals, it was her duty to answer them. Beyond this, however, the answer admits that a signal of two whistles was heard, and a white light close on the Canadian bank of the river was noticed, but the signal was not answered, as it seemed to be intended for some other vessel. However, the white light in connection with the whistles could only have been the masthead light of a steam vessel, and as there is no evidence that there was any other vessel coming up the river, the signal could only have been intended for the New York. If she were unable to see the colored lights of the approaching steamer, it was her duty to stop until she made them out, or otherwise determine the identity and course of the approaching vessel.

Her only excuse for her omission is that she was the preferred vessel within the nineteenth American and sixteenth Canadian rule, and that by the twenty-third American and twenty-second Canadian rule, it was her duty to keep her course. But the fact, that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty. As was said in the case of *The Sunnyside*, 91 U. S. 208, 222: "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters." See also *The Delaware*, 161 U. S. 459; *The Maria Martin*, 12 Wall. 31, 47. Both the Canadian and American codes provide that in construing and obeying these rules, due regard must be had to all dangers of navigation and to any special circumstance which may exist in any particular case, rendering a departure from them necessary in order to avoid

Opinion of the Court.

immediate danger. There is another rule pertinent in this connection, namely, rule twenty-one, American, and article eighteen, Canadian, that every vessel when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. That the obligation to observe this rule attached to the New York under the peculiar circumstances of this case is entirely clear. Her attention had been called to the fact that a steamer was coming down the river between the rear barge and the Canadian bank. The channel was narrow, and the descending vessel had signified her intention to starboard her helm and pass the New York to the left. The New York avers in her answer that there was not room enough for any vessel to safely pass between her and the Canadian bank, but notwithstanding this, she kept her course toward that bank, and was thus constantly narrowing the channel through which the Cone-maugh signified her intention of passing. She averred that her speed in passing the tow was about four miles an hour, but the District Judge was of opinion that she maintained double that speed until the vessels came together. However this may be, her failure to answer the whistles of the Cone-maugh or to stop and reverse, after her white light was seen, was wholly inexcusable, and, under the particular circumstances, cannot be justified by her general duty as a favored vessel to keep her course, or by anything that was said by this court in *The Britannia*, 153 U. S. 130. The master of a preferred steamer cannot, by blindly adhering to his course, atone for the neglect of other precautions.

We do not wish to say that the New York was under any obligation to assent to the proposed arrangement, although in starboarding and passing close to the two rear barges she did in fact take the exact course she would have taken if she had assented. If she had blown one whistle she would have indicated her intention of pursuing her course under her port wheel as the privileged vessel; while if she had blown two whistles she would have starboarded, as she did starboard, and keep as near the rear barges as she safely could. What we do decide is that the duty to answer a signal is as impera-

Opinion of the Court.

tive as the duty to give one. Not only does the second rule of the Supervising Inspectors require of crossing steamers that "signals by whistles shall be given and answered promptly," but ordinary prudence demands that an obligated steamer proposing by whistle to deviate from the customary course shall receive an immediate reply, that her wheel may be at once put to starboard or port, as the exigencies of the case may require. A delay of even a few seconds may seriously embarrass her as to the intention of the preferred vessel. This is now made obligatory upon vessels navigating the Great Lakes by the act of February 8, 1895, c. 64, 28 Stat. 645, the twenty-third rule of which declares that "every steam vessel receiving a signal from another shall promptly respond with the same signal, or as provided in rule twenty-six." If the New York had promptly answered the Conemaugh's signals, probably no collision would have occurred.

The comments we have made upon the failure of the Conemaugh to stop and reverse are equally pertinent to the case of the New York. If she did not hear the whistles of the Conemaugh, she ought to have heard them; but irrespective of this, there was enough to apprise her of her danger in pursuing her course with unabated speed. She knew that she was about to meet in a narrow channel a steam vessel coming down upon her with the added speed given by a current of two to two and a half miles an hour. She heard her final signal of two blasts as she was passing the last barge, and should have known that if she continued her course a collision would be inevitable, and yet she did not stop or reverse. Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect. We cannot impress upon the masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels.

But, assuming the theory of the New York to be true, and

Opinion of the Court.

that as the preferred vessel she was bound to keep her course, under rule nineteen, the fulfilment of her duty in that regard undoubtedly added to the embarrassments of the Conemaugh. It is averred in her answer that after making the white light of the Conemaugh she continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded, so as to go close under her stern. For this change in her course she relies upon the case of *The John L. Hasbrouck*, 93 U. S. 405, in which we held that the obligation of a privileged vessel to keep her course does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation. In that case a sailing vessel descending the Hudson River at West Point was held to have been excused in changing her course to round a projection at that place, but in this case the New York had still from five to eight hundred feet before her before reaching the Canadian bank. Her original porting was undoubtedly to avoid the tow, but there seems to have been no immediate necessity for her starboarding to pass so close to the rear barges, though we should not condemn her upon this ground. See discussion of this in *The Velocity*, L. R. 3 P. C. 44; *The Banshee*, 6 Asp. M. L. C. 221. While the presence of the tow undoubtedly rendered it necessary for the New York to port, and thus to become a crossing vessel, and a preferred vessel under rule nineteen, there was no obstruction to her continuing under her port wheel until she had approached so near the Canadian bank as to make it necessary to turn.

The theory of the New York is an inconsistent one—as inconsistent as that of Conemaugh. She argues that she was under no obligation to assent to the signals of the Conemaugh by starboarding her helm. But she did in fact starboard her helm, and now insists that she did this in discharge of her duty as a preferred vessel to resume her course after she had cleared the obstruction. But without deciding that she was in fault for starboarding, her conduct in so doing adds another to the many reasons why she should have indicated to the descending steamer her proposed course. If the Conemaugh

Opinion of the Court.

recognized the fact that she were the preferred vessel and bound to hold her course, it would naturally confuse her to see the New York suddenly starboarding, exhibit both her colored lights, and point directly toward her, as she must have done. The probable explanation of the course of the New York is that the officer of her deck was so intent upon watching the lights of the barges that he omitted to notice the lights of the Conemaugh until the vessels had approached so near that a collision became extremely probable. The fact that her lights were seen and her signals heard by the crews of the Burlington and her barges and by persons standing upon the coal dock, at a greater distance from the Conemaugh than was the New York, only indicates more clearly that her lookout was either insufficient or incompetent. If he actually saw her and reported her to the officers of the deck, the responsibility is only shifted from the lookout to them.

Our conclusions are that the Conemaugh was in fault:

For not stopping, when the New York failed to answer her signals;

For porting and then starboarding in order to cross the bow of the New York;

and the New York:

For an inefficient lookout;

For failing to answer the repeated signals of the Conemaugh; and

For failure to stop, after she made the white light of the Conemaugh, until her course and movements had been satisfactorily ascertained.

4. The final question arises upon the insistence of the underwriters of the Conemaugh's cargo, that they are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision. They are correct in this contention. Indeed, this court has already so decided in the case of *The Atlas*, 93 U. S. 302, 315, 317. This was a libel against the Atlas by an insurer of the cargo of a canal boat in tow of the steam tug Kate, whereby the canal boat and her cargo were

Opinion of the Court.

lost. It was insisted by the claimant that, as the libellant had failed to make the Kate a party, and as both vessels were found to be in fault for the collision, there could be a recovery of only a moiety of the damages. The case of *The Milan*, Lush. 388, was confidently relied upon as an authority. This court, however, was of opinion that a plaintiff, who has suffered a loss by the negligence of two parties, was at liberty, both at common law and in admiralty, to sue both wrongdoers or either one of them at his election, and "it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately. . . . Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libellant, nor is it a question in this case whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act." A like ruling was made in *The Juniata*, 93 U. S. 337, in which a libel was filed by the United States as owner of the cargo of a flatboat in tow of one of two vessels.

The decree of the Court of Appeals is therefore reversed and the case remanded to the District Court for the Eastern District of Michigan for further proceedings in consonance with this opinion. Costs will be divided equally.

On the 7th of December, 1899, this decree was reversed, the claimants of the Conemaugh and the claimants of the New York were ordered each to pay one half of all costs in the cause, and the cause was remanded to the District Court of the United States for the Eastern District of Michigan, with directions to enter a decree, in conformity with the opinion of this court, with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan.

